DOCUMENT RESUME

ED 473 341	EA 032 361
TITLE	Balancing Rights: Education Law in a Brave New World. Papers [of the] Education Law Association (ELA) Annual Conference (48th, New Orleans, LA, November 14-16, 2002).
INSTITUTION	Education Law Association, Dayton, OH.
PUB DATE	2002-11-00
NOTE	614p.; For individual conference papers, see EA 032 362-399.
AVAILABLE FROM	Education Law Association, Mail Drop 0528, 300 College Park, Dayton, OH 45469. Tel: 937-229-3589; Fax: 937-229-3845; e-mail: ela@udayton.edu; Web site: http://www.educationlaw.org.
PUB TYPE	Collected Works - Proceedings (021)
EDRS PRICE	EDRS Price MF03 Plus Postage. PC Not Available from EDRS
DESCRIPTORS	Accountability; Civil Rights; Due Process; Educational Legislation; Elementary Secondary Education; Higher Education; In Loco Parentis; *Legal Problems; Preschool Education; Public Schools; *School Law; School Policy; School Responsibility; School Security; *Student Rights; Teacher Rights
IDENTIFIERS	Employee Rights; Legal Rights

ABSTRACT

This collection contains 54 papers from the 48th annual conference of the Education Law Association held in November 2002. It has as its focus education law, yet it covers a wide variety of topics and issues affecting the entire range of education from preschool to college. Among the topics are the following: school vouchers; school safety and security; educational financing; accountability and educational malpractice; assessments and high-stakes testing; teachers' rights and responsibilities; school desegregation; special education; equal protection under the Constitution; employee rights; school dress codes and uniform policies; performance pay for superintendents; charter schools; academic freedom; technology in education; students' rights; freedom of speech; the teaching of law; and sexual misconduct. (Contains an author index.) (WFA)

Reproductions supplied by EDRS are the best that can be made from the original document.

ED 473 341

Balancing Rights: Education Law in a Brave New World.

Papers [of the] Education Law Association (ELA) Annual Conference (48th, New Orleans, LA, November 14-16, 2002).

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

☑ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality

- Points of view or opinions stated in this document do not necessarily represent official OERI position or policy

PERMISSION TO REPRODUCE AND DISSEMINATE THIS MATERIAL IN MICROFICHE, AND IN ELECTRONIC MEDIA FOR ERIC COLLECTION SUBSCRIBERS ONLY, HAS BEEN GRANTED BY

R. Wagner

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

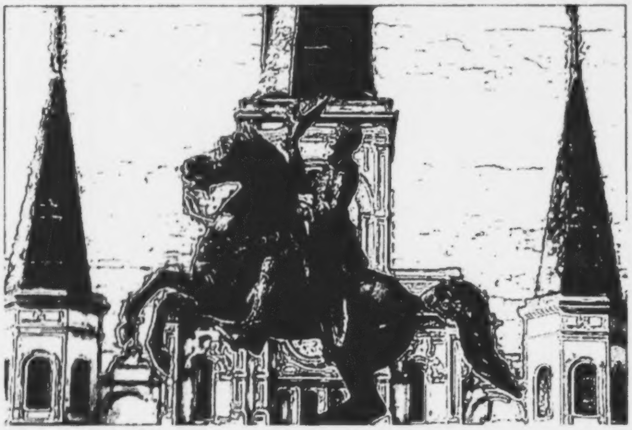
2A

EA 032 361

BEST COPY AVAILABLE

Balancing Rights

Education Law in a Brave New World



2002 Conference Papers
Education Law Association
48th Annual Conference
November 14-16, 2002
New Orleans, Louisiana

Balancing Rights

Education Law in a Brave New World

2002 Conference Papers
Topic Outlines

Education Law Association
48th Annual Conference
November 14-16, 2002
New Orleans, Louisiana

Education Law Association
300 College Park – 0528 / Dayton, OH 45469
Phone: (937) 229-3589
Fax: (937) 229-3845
Email: ela@udayton.edu
Internet: http://www.educationlaw.org
© 2002 by the Education Law Association
All rights reserved
Printed in the United States of America

Education Law Association
48th Annual Conference
November 14-16, 2002
New Orleans, Louisiana

Table of Contents

A.1 Flame On: The Fight Over Vouchers Will Be a War Within the States 1
Edwin C. Darden

A.2 Safety on the Campus: Whose Responsibility? 7
Robert C. Cloud

A.3 Pot Addiction and Parental Friction: Emotional Disturbances, Conduct Disorders, and Unilateral Placements for Drug-Abusing Students under the IDEA 25
David S. Doty

A.4 Finance

Education Finance Litigation: An Examination of Emerging Trends and Future Directions 43
R. Craig Wood *John Dayton*

Education Clauses, State Contexts, and Finance Case Outcomes: Towards a Holistic Constitutional Interpretation 57
Karen DeMoss

A.6 Teaching Law

The Convergence of Education and Law: A New Class of Educators and Lawyers 71
Sarah E. Redfield

Asked and Answered: Preparing Ethical, Legally Literate Future School Leaders 85
Margaret A. Noe

A.7 Testing

Accountability and Educational Malpractice: A New High-Stakes Test? 97
Todd A. DeMitchell

Due Process and Student Portfolio Assessment in an Era of High-Stakes Testing 101
Kevin P. Brady

B.2 Balancing Fundamental Human Rights and Civil Liberties in an Emerging Democracy: Education Law, Policy, and Practice in South Africa 107
Johan Beckmann *Willie van Vollenhoven*
Rika Joubert *Simeon Maile*

B.3 Sovereignty Immunity and Public Higher Education 139
M. Christopher Brown *Jason E. Lane*
Robert M. Hendrickson

B.4 Teacher Accountability

Balancing Rights in Teacher Evaluation: Statutes, State Board Policies, and Contractual Rights 145
Carole V. de Casal *Jerry Chappell*
Charles M. Green *J. Sue Marsh*

Documenting Inadequate Performance in an Era of Accountability 147
Kermit Buckner

Table of Contents

B.5 Do Special Education Teachers Leave Their Rights at the Schoolhouse Door? 157
Angela Maynard Sewall *Kathy Balkman*

B.6 Doing Business with Entrepreneurial America: Protecting School District Interests 171
Robert S. McCord *Gerald Kops*
T.C. Mattocks

C.1 In Search of Klebold's Ghost: Investigating the Legal Ambiguities of Violent Student Profiling 185
Merry Rhoades *Gayle Tronvig Carper*
Steven Rittenmeyer

C.2 Desegregation

The "Good Faith" Requirement in School Desegregation Cases 199
Charles L. Patin, Jr. *William M. Gordon*

Desegregation, Unitary Status and Vouchers 223
James J. Van Patten *Barbara Shircliffe*

C.3 Special Education

School Issues under Section 504 and the ADA: The Latest and Greatest 235
Steven R. Aleman

Section 504/ADA Student Issues: The Latest and Greatest 245
Perry A. Zirkel

C.4 Student Records

FERPA Update 2002: The Two New Supreme Court FERPA Cases and Post-9/11 Congressional Balancing of Student Privacy and Safety Interests 255
Lynn M. Daggett

FERPA: What Exactly Is an Educational Record? 271
Sara L. Doyle

The Court: A Tool for School Improvement? 279
Jason P. Klein

C.5 Fourth Amendment

Search and Seizure 291
Kenneth T. Murray

Search and Seizure of Students in Public Schools: 2002 Update of Fourth Amendment Cases 301
Jacqueline A. Stefkovich

C.6 Resurrection of the Eleventh Amendment: Are the Rights of Special Education Students in Jeopardy 315
Christine J. Villani *B. Darren Burns*
Cynthia A. Dieterich

C.7 Due Process Rights in Public Education: The Constitutional Dimensions of an Employee's Fourteenth Amendment Liberty Interest in Good Name and Reputation 325
Donald F. Uerling *John L. Strope*

D.3 The Emergence of a Fourth Type of Public Forum: Is the Quasi-Nonpublic Forum a New Paradigm for Student Free Speech Cases? 341
Elizabeth T. Lugg *Frances R.A. Patterson*

Table of Contents

D.5 Employee Rights

Protected Classroom Speech of Public School Teachers: *Pickering* and Its Progeny 365
Ronald T. Hyman

Examining the Present and the Future of Legal Protections for Controversial Teaching in Public Schools 381
Kevin Welner

D.6 Louisiana and the Law

School Board Training Academy: A Project for the 21st Century and Beyond 393
Nathan M. Roberts

Religion and Education in Louisiana 399
David L. Stader *Flo Hill*
Tony Armenta

D.7 Ethical Issues for the School Attorney 411
Richard J. Dickinson *John P. Concannon*

E.2 Higher Education

Academic Freedom: A Precarious Balance 415
John A. LaNear

E.3 Infants, Toddlers, and Preschoolers: What's in the IDEA for Them? 425
Mary Jane K. Rapport

E.4 Sex and the Computer 429
David R. Friedman *Stuart S. Mukamal*

E.5 Sources and Effectiveness of Legal Training for Educational Administrators 437
Brenda. Kallio *Liliana Valadez*

E.8 Superintendent Contracts: Pay for Performance? 453
Leslie Robert Stellman

F.1 Gender

Beauty Meets the Beast: The Role of Dress and Appearance Standards in Gender Discrimination Cases 455
Karen L. Michaelis

Humpty Dumpty Jurisprudence: Definitional Confusions and Legal Conundrums in Sex, Gender and Sexual Orientation Discrimination Law 463
Susan J. Scollay *Carolyn S. Bratt*

F.2 The Substantive and Procedural Due Process Rights of Students Accused of Criminal Behavior in School and the Educational Rights of Adjudicated Youths 473
Frank Brown

F.3 Negligent Liability Issues Involving Colleges and Students: Does an Ethic of Caring Heighten Institutional Liability? 503
Joseph Beckham *Douglas Pearson*

F.4 It's Not the Law—It's the Implementation That Matters: What 150 Frontline Implementers Can Teach Lawyers, Legislators, and School Leaders about Effective Strategies for Promoting School Inclusion 519
Chuck Vergon *Lauren Broderick*

Table of Contents

F.5 Fourth Amendment

The Balance between Student Drug Testing and Fourth Amendment Rights in Response to *Board of Education v. Earls* 525
Stacey L. Edmonson

The Effectiveness of Legality of Random Drug Testing Policies 535
Joseph R. McKinney

F.6 Charter Schools

Charter Schools and Race 541
Preston Green

F.7 California and the Law

Exploding the Myth of Academic Freedom: The Powder Keg of Standards and Accountability in California 547
Deborah E. Stine *Jim Hill*

Balancing the Rights and Responsibilities of the School Board and the Public's Right to Know: California's Open Meeting Law 561
David O. Stine *Sherry G. Gordon*

G.2 Trends in Higher Education Collective Bargaining 571
Jon E. Anderson

G.4 Technology in Public Education: What Will the Quest for Fairness and Efficiency Do to Individual Interests and Rights? 583
Kirk D. Strang

G.5 Teacher Sexual Misconduct: Discerning the Difference between a Classroom "Crush" and a Career Catastrophe 599
Mary Ann Manos

G.6 Testing

Chicago Public Schools' Promotion Policy: Potential Due Process Violations and Title VI Implications 605
Sarah Helvey *Judith Risch*

Integrating Legal Rights of Students into the School Curriculum 621
James O. Tate

G.7 The Legal Status of the Course Syllabus 631
Terrence Leas

Author Index 633

Flame On: The Fight Over Vouchers Will be a War Within the States

By Edwin C. Darden
Senior Staff Attorney
National School Boards Association
November 2002

The next conflagrations involving vouchers for K-12 education will occur in the state courts and the statehouses. Literally from coast-to-coast – from Maine to Washington state – brush fires of discontent are being fanned by vouchers proponents who sense that their win at the United States Supreme Court must now be supplemented at the local level.

The outcome of these flare-ups will determine if vouchers are truly the next big idea and the most powerful alternative when public schools fail, or whether the movement will be relegated to a footnote in the education history of the United States.

One would be foolish to bet generously in either direction. Yet, trend-wise, voucher proponents have had a tough time convincing state court judges to read broadly the language found in state Constitutions. Voucher supporters have had an even tougher time convincing the masses that a voucher entitling a student to walk from their public school haven and take public taxpayer dollars down the street to a neighborhood private or parochial school, is even worthwhile.

As far as vouchers are concerned, the period that we are in now is both dynamic and uncertain. Yet, since the June U.S. Supreme Court decided in *Zelman v. Simmons-Harris*, 122 S. Ct. 2460 (2002) that voucher programs, structured correctly, can overcome any objections based upon First Amendment religious separation grounds, the voucher cheering squads have been revitalized.

What has yet to be resolved is two-fold. First, whether the legally permissible state clauses that are more restrictive than the federal Constitution's Establishment Clause will indeed prove to be an impediment to the implementation of vouchers. Second, is whether public opinion will support the kind of large-scale exodus from public schools that the most enthusiastic promoters seek. This paper will examine each question in turn.

There are basically two approaches taken in state Constitutions that might puncture the tire of the voucher juggernaut. The first are the so-called "Blaine Amendments" – variations of which can be found in 36 states (and Puerto Rico) and which explicitly prohibit grants or appropriations to religious institutions or organizations. The language, originally proposed by U.S. Congressman James G. Blaine of Maine in 1875, failed despite an effort to make it part of the nation's Constitution. In response, states started adopting what were casually referred to as "little Blaine Amendments" to their state Constitutions, effectively barring public money to religious causes.

10

Critics of Blaine Amendments allege that the swift passage of these little Blaines was fueled by anti-Catholic sentiment and that the real motivation behind these state Constitutional amendments was to keep the money out of the hands of Catholic individuals who objected to the protestant-oriented public schools and were looking to fund their own schools.

The second method is a little more indirect, but provides the same sort of hurdle as the Blaine Amendments. In this rendition, the state Constitution provision states that no individual shall be compelled to support any ministry without her or his consent. This language hails from the colonial period and is meant to address the then-common practice of government collecting money for the support of churches. According to the Institute for Justice, only three states (Louisiana, Maine and North Carolina) contain neither the Blaine Amendment nor the compelled support language; 18 of the states have both.[1]

Here is the current status of some active cases:

Florida

Voucher foes are savoring a victory at the state circuit court level in Florida in *Holmes v. Bush* and *FEA v. State Board of Education.* The court in the consolidated cases said the religious clause of the Florida Constitution is quite clear, and that it allows no room for public money to be diverted to vouchers. The program, which involves placing letter grades on public schools and allowing students to exit from buildings that fail for more than two years in a row, is continuing while an appeal is being pursued.

Maine

The Institute for Justice, a Washington, D.C.-based think tank that advocates for vouchers, is the force behind *Anderson v. Town of Durham*, a case that challenges Maine's 1981 state law barring religious schools from participating in a system that lets public high school students attend the private or public school of their choice. The idea is that small towns pay the tuition of students to go elsewhere, rather than pay for the maintenance and upkeep of the schools as part of the district. The Institute represents six families from three small towns in Maine—Durham, Minot and Raymond – in the first of what it calls its nationwide school choice counteroffensive after the Supreme Court decision in *Zelman.*

Washington State

In *Harrison v. Gregoire*, the Institute for Justice on September 24, 2002, took a new tack in its litigation efforts. The group is challenging a state policy that forbids public school students from teaching in religious schools. That means that teacher certification candidates attending public universities must conduct their student teaching at public schools rather than Catholic, Seventh Day Adventist or other religiously affiliated learning institutions. The Institute alleges that the state has interpreted its Blaine Amendment too broadly.

Massachusetts

The Becket Fund has gotten creative, filing a federal lawsuit in 1998 (*Boyette v. Galvin*, No. 98-CV-10377-GAO) to overturn a section of the Massachusetts Constitution that "no grant, appropriation or use of public money or property or loan of credit" shall be made in support of religious institutions. That language dates from 1854 – long before Blaine ever entered politics.

---

[1] Richard Komer and Clint Bolick, *School Choice: The Next Step: The State Constitutional Challenge* (2002) at *http://www.ij.org/editorial/choice_next.shtml*.

Even in *Zelman*, the U.S. Supreme Court left open the possibility that states would erect their own blockades to vouchers, with Justice Thomas in a concurring opinion writing that states should not let the Establishment Clause prevent them from passing laws that "include or touch on religious matters." Thus the interpretation of state clauses in state Constitutions and the permissibility of statutes are ultimately decided by each state's highest court.

On to the Statehouses

One ripple effect of the U.S. Supreme Court decision is that it puts the voucher debate back into the political arena. Having dispensed with the Establishment Clause objection, many state legislatures will now consider passing laws that permit tax money to be used for private, religious schools. Naturally, however, a political consensus will have to gel around the idea before it can get passed and signed into law. And, in recent times that groundswell has been hard to come by and discouraged both in the state legislative chambers and at the ballot box in states with referenda or initiatives. The primary question is this: will vouchers improve student achievement? A skeptical public does not necessarily believe that one can improve education by steering a certain percentage of students away from it. Nor do they believe that the primary motivation behind vouchers is to "save" poor and oftentimes racial and ethnic minority children.

U.S. Supreme Court Justice John Paul Stevens intimated in his dissent that the fallout from the *Zelman* decision would be an increase in divisiveness and acrimony among the public. "Whenever we remove a brick from the wall that was designed to separate religion and government, we increase the risk of religious strife and weaken the foundation of our democracy," Stevens wrote.

Public support for vouchers has been at best, ambivalent and at worst, hostile. Voters have rejected every voucher proposal put before them in the last 30 years. In 2000, 71 percent of California voters rejected a voucher plan, while 69 percent of Michigan voters did the same. A California poll by CNN.com found that people of all races, political parties and income levels voted against vouchers.

One measure of how important this issue has grown, is the fact that the National School Boards Association has developed a "Voucher Strategy Center" which focuses on developments, information and advocacy against vouchers wherever it might arise.[2]

Yet another aspect of the voucher battle is the one over accountability. The reauthorized Elementary Secondary Education Act (dubbed No Child Left Behind) was passed in early 2002 and imposes a series of strict mandates on public schools. There are testing requirements, community reporting requirements and exit provisions that are all designed to hold school boards and educators accountable for the academic performance of students.

Beyond test scores, the accountability can include such things as curriculum, teacher certification, student discipline, enrollment of minority or special education students and onward.

A Milwaukee school board member makes the point about governance powerfully in talking about the subject. The Wisconsin city had a voucher program of its own with which to deal.

---

[2] *See* attached NSBA/Zogby International Poll on Vouchers.

"For policymakers and taxpayers, the overarching problem with the Milwaukee voucher program is the lack of useful data on participating students and schools. School board members are responsible for the thoughtful and effective spending of the tax dollars entrusted to us, but who is overseeing the public's investment in voucher schools? No one." *Jennifer Morales, Milwaukee school board member.*

It seems clear that the U.S. Supreme Court was leading up to the conclusion that vouchers are permissible. Two years ago in *Mitchell v. Helms*, 530 U.S. 793 (2000) (a decision that dealt with public money for technology in religious schools) the opinion by Justice Clarence Thomas seemed to outline a blueprint for a public-private relationship that would pass muster. Using that platform in *Zelman*, Chief Justice William Rehnquist indicated that choice programs that are focused on low-income students in low-performing schools in particular, are just providing one more alternative for delivery of educational services.

By tradition, private schools have escaped the accountability scrutiny by virtue of their private status. Yet, the question that must be asked is what is the impact of public money reaching private school coffers via a voucher? If religious schools accept the taxpayer money, should they similarly be held accountable and forced to disclose key data about student achievement?

Another question to be asked is whether students who arrive with tax-funded vouchers are able to opt out of the religious worship and other religious activities that are otherwise mandatory.

A final irony of the *Zelman* decision was highlighted in an article in the publication *Education Week*. It noted that the general thrust of the decision is to make it more possible for government to provide aid to religious activities. But, that ability, coupled with the Court's free speech doctrine that almost guarantees equal access to any group with religious convictions, may "make it very difficult to exclude even the most obnoxious and controversial private religious schools from participating in voucher plans."[3]

---

[3] Tyll van Geel and William Lowe Boyd, *Vouchers and the Entanglement of Church and State*, Education Week (Sept. 4, 2002), http://www.edweek.org/ew/ew_printstory.cfm?slug=01boyd.h22.

KEY FINDINGS OF MAJOR NATIONAL OPINION POLL BY NSBA/ZOGBY INTERNATIONAL

- **Americans say public money demands public oversight. Vouchers eliminate oversight.** Up to 90 percent of Americans expect private schools that accept vouchers to meet many of the same accountability standards as public schools. But voucher programs fail to meet these expectations. These include:

  -- 90 percent of all adults and 86 percent of African-Americans expect a private school "to publicly disclose how it spends tax dollars."

  -- 89 percent of all adults and 93 percent of African-Americans expect a private school "to give their students the same state tests as public school students, and report those test results."

  -- 89 percent of all adults and 89 percent of African-Americans expect private school students "to meet the same academic standards" as public school students.

  -- 80 percent of all adults and 87 percent of African-Americans expect private schools "to admit all students, regardless of academic or physical abilities."

- **Americans oppose draining tax dollars from public schools. Vouchers do this precisely.** Nearly 40 percent of Americans who initially said they *supported* vouchers, change their minds if it means the public schools lose tax dollars. Among African-Americans who initially supported vouchers, 57 percent withdraw their support if public schools lose money.

- **Americans rank vouchers near the bottom in ways to improve public schools.** A mere 12 percent of all adults and just 5 percent of African-Americans said vouchers are the way to most improve public schools. Americans prefer their tax dollars be invested to help reduce class sizes and strengthen teacher quality. For example, African-Americans are 7 times as likely to choose smaller class sizes over vouchers as the way to improve public schools.

- **Among African-Americans, 57 percent oppose vouchers while only 41 percent favor them.** And, 41 percent said they "strongly oppose" vouchers, more than double the 19 percent who "strongly favored" them.

- **Americans oppose vouchers for students already in private schools.** Sixty-one (61) percent of all adults and 74 percent of African-Americans oppose vouchers for students who already attend private schools. In Cleveland, 1 in 3 of the current voucher students attended private schools before receiving a tax-funded voucher.

Access the entire poll at NSBA's Voucher Strategy Center web site: nsba.org/novouchers.
Poll conducted in 2001 by Zogby International, interviewing 1,211 adults.
Margin of error for adults is +/- 3 percent; for African-Americans it is +/- 5.7 percent.

Visit www.nsba.org/novouchers -- NSBA's Voucher Strategy Center
National School Boards Association 1680 Duke Street Alexandria, Virginia 22314-3493
703-838-6722 (p) 703-683-7590 (f) www.nsba.org

SAFETY ON CAMPUS: WHOSE RESPONSIBILITY?

ROBERT C. CLOUD, Ed.D.
Professor of Higher Education
and Educational Administration
Baylor University

EDUCATION LAW ASSOCIATION
48th ANNUAL CONFERENCE
NOVEMBER 14-16, 2002
NEW ORLEANS, LOUISIANA

Safety on Campus: Whose Responsibility?

Introduction

The term *safety* is defined as freedom from the occurrence or risk of injury, danger, or loss (Webster's Dictionary, 1989). Freedom from unreasonable danger, injury, or threat to life is perhaps the most basic of rights in a civilized society. Indeed, the Founding Fathers described the right to life as an inalienable right in the Declaration of Independence:

> We hold these truths to be self evident, that all men are created equal, that they are endowed by their Creator with certain inalienable rights, that among these are life, liberty, and the pursuit of happiness. That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed.

It was no accident that the authors of the Declaration listed the right to life before the companion rights to liberty and the pursuit of happiness. Individuals who fear for their personal safety are not truly liberated to seek happiness and success. In the absence of personal safety, the inalienable rights that were first asserted in the Declaration, and then guaranteed by the Constitution, seem to lose much of their importance. The Founding Fathers recognized this fact and charged the government with responsibility for securing the lives (i.e., the safety) of all citizens.

In light of events since September 11, 2001, many Americans are currently concerned about their personal safety and the security of the nation. That concern extends to college and university campuses because the very nature of post secondary institutions makes them potentially unsafe places. Millions of students congregate on

American campuses daily (13.4 million undergraduates and 2.1 million graduate students during the fall semester 2002, American Council on Education data, August 2002). Some are away from home and without parental supervision for the first time in their lives. Consequently, campuses can attract unsavory characters with criminal intent who prey on the naivete and/or vulnerability of students and employees.

Post secondary institutions have to be free and open places if they are to maximize services to students. Indeed, one hallmark of quality higher education institutions is *accessibility—access* to outstanding faculty; *access* to ideas, concepts, and information; *access* to services and facilities; *access* to diversity; *access* to recreational and athletic programs; and *access* to a wide range of leadership opportunities. Colleges and universities provide this access in multiple sites at virtually all hours. Students, faculty, and staff are entering and exiting the campus on a continuing basis. From a practical standpoint, it is very difficult to monitor (much less control) all of this activity by students and employees on a given campus. Ensuring personal safety and protecting property is a real challenge in this setting. Ironically, the more accessible and efficient a campus becomes in delivering services to students, the greater the potential threat to the safety and security of the campus community. The potential for criminal activity on the campus—including burglary, robbery, assault, rape, and murder—is obvious. All of this makes safety a priority for every college and university administration and governing board in the United States.

The Demise of *In Loco Parentis*

In loco parentis may be defined as *in place of the parent; instead of the parent; or charged with the rights, duties, and responsibilities of the parent* (Black, 1990). There was a time, of course, when educators at all levels acted *in loco parentis*, particularly in the public schools. For a long time, federal courts also permitted (even encouraged) colleges and universities to act *in loco parentis* (*Gott v. Berea College*, 1913). Higher education administrators were allowed to impose strict regulations on the behavior of *adult students*. Many chose to do so. Consequently, a *special relationship* developed between post secondary institutions and students that imposed a duty on the institution to control conduct and, reciprocally, gave to students certain expectations of protection and personal safety (Restatement (Second) of Torts, Section 315, 1977). Higher education reflected this paternalistic approach for many years, but all of that has changed.

In loco parentis in post secondary education began a gradual, but steady, decline after World War II for a number of reasons including the Servicemen's Readjustment Act of 1944 and the campus upheavals of the 1960s. With the assistance of the Servicemen's Readjustment Act (also known as the G.I. Bill), 2.2 million veterans returned from the war to enroll in colleges and universities (Stark and Latucca, 58-59). Although some of those veterans were not yet 21 years of age when they enrolled, they had earned the right to be treated as adults at Iwo Jima, the Battle of the Bulge, Omaha Beach, and so many other places. They had grown up quickly; they could take care of themselves; and they demanded the right to determine their own lifestyles. In light of the post-war "invasion" of higher education by the G.I.s, *in loco parentis* had to be re-assessed. The campus revolution of the 1960s also weakened the foundation of *in loco parentis*. Students rebelled against the federal government's policy on the Vietnam War and the oppressive policies on many campuses. In general, the student activists succeeded in acquiring a new legal status for all post secondary students. As a result, college students are no longer treated as minors; they are considered to be adults with privacy and due process rights. Under institutional policy and the law, students are now guaranteed substantive and procedural due process in disciplinary matters that may result in suspension or expulsion.

The United States Supreme Court's decision in *Tinker v. Des Moines Independent Community School District et al.* was a third factor contributing to the demise of *in loco parentis*. *Tinker* was considered during the Vietnam War. The petitioners included three students who were sent home from public school and ultimately suspended until they removed black arm bands being worn to protest government policy on the war. School officials maintained that the arm bands were distracting and causing disruption in the school. However, testimony in the case revealed that the students were polite and compliant when wearing the arm bands; they were not disruptive or disrespectful; and they did not attempt to recruit other students to join their cause. No acts of disruption or violence could be attributed to the arm bands. In light of the facts, the Supreme Court concluded that wearing the arm bands was a symbolic form of free speech, protected by both the Free Speech Clause of the First Amendment and the Due Process Clause of the Fourteenth Amendment. After *Tinker*, students could not be denied their rights to free speech and association without good cause and appropriate due process.

In an effort to guide school officials in future attempts to regulate student speech, the Supreme Court developed a test to clarify the constitutionality of proposed administrative actions. According to the "*Tinker* test," restrictions on speech are constitutional only if officials can demonstrate that the conduct "materially and substantially interferes with the requirements of appropriate discipline in the school" (*Tinker v. Des Moines Independent Community School District et al.*, 509). In the absence of such proof, school officials may not restrict the free speech or other constitutional rights of students. In other words, public school students have the same constitutional rights as all other citizens subject only to the "special characteristics" of the school referred to by Justice Fortas in the opinion (*Tinker*, 506). The *Tinker* decision changed traditional school disciplinary procedures significantly because school officials no longer act *in loco parentis* except under very limited circumstances.

Although the *Tinker* ruling has been modified by two subsequent Supreme Court decisions in *Bethel School District No. 403 v. Fraser* and *Hazelwood School District v. Kuhlmeier*, neither of the decisions reversed *Tinker* nor signaled a return to *in loco parentis*. See legal notes on *Bethel* and *Hazelwood* in the cases-sited section. Students at all levels retain their rights to free speech, due process, and equal protection under the law, subject only to the special characteristics of the schools. The *Tinker* decision established once and for all that school officials do not exercise absolute authority over their students. In light of that fact, it seems reasonable (and fair) that schools and colleges are not normally responsible *for the unforeseeable behavior or the safety of their students*.

The Crime Awareness and Campus Security Act of 1990

On November 8, 1990, Congress enacted The Crime Awareness and Campus Security Act in response to increasing concern about crime on college and university campuses. Also known as "The Clery Disclosure Act" in memory of Jeanne Ann Clery who was murdered on the Lehigh University campus in 1986, the 1990 Act amended Section 485 of the Higher Education Act of 1965. In researching the issue of campus safety prior to passage of the 1990 Act, Congress found that students and their parents did not have access to current information about campus crime. Indeed, no one had access to such information including the federal government, law enforcement agencies, and higher education administrators. The reason was simple; there was no national clearinghouse for the compilation and dissemination of campus crime statistics. Only 352 of approximately 8000 post secondary institutions voluntarily provided campus crime statistics through the Uniform Crime Report (UCR) of the Federal Bureau of Investigation (Finding section of the Crime Awareness and Campus Security Act, 1990). The entire structure for reporting and responding to campus crime seemed primitive when compared with other institutional services to students and the federal government.

The Crime Awareness and Campus Security Act currently requires higher education institutions to report crime in eight specific areas and to document the number of student arrests and disciplinary actions related to liquor law violations, drug-related offenses, and weapons possession. The latter reporting requirement was added recently because of Congressional findings that approximately 90% of student crimes occur while the perpetrator is under the influence. The 1998 Amendments to the Higher Education Act also require colleges and universities to report hate crimes in which the victim was intentionally selected because of his or her actual or perceived race, gender, religion, sexual orientation, ethnicity, or disability. Federal regulations regarding the disclosure of campus crime statistics are codified in 34 C.F.R. 668.46. Current information on post secondary campus crime is available in the Department of Education's annual reports to Congress and online via the Department's Web site at http://www.ope.ed.gov/security.

Analysis of Case Law re. Campus Safety

The author analyzed 23 federal and state cases that relate to campus safety and security issues. Those cases are listed along with legal notes at the end of this manuscript. The legal principles considered in the cases are discussed in the following section.

Legal Principles Germane to Campus Safety

Courts now consider several legal principles as they deliberate campus safety and security cases. Each principle serves as a benchmark for assessing institutional efforts to protect the rights and safety of students and staff. When considered collectively by the court, these principles provide a legal framework that can be used to judge whether a student plaintiff received the protection to which he or she was entitled under policy and the law. If the court decides that the answer to the question is yes, then the institution will be cleared and the case dismissed. If the answer is no, then the plaintiff prevails, and he or she may be entitled to damages from the institution for its failure to provide a reasonably safe environment. In deliberating a given case, the court may consider any one or all of the following principles:

- *business invitee* - one who is invited to premises for transacting business and to whom a duty of care is owed. One who goes on another's premises for transacting business and to whom a duty of care is owed. One who goes on another's premises at express or implied invitation of the owner for benefit of the invited or for the mutual benefit and advantage of both invited and invitee. *A student attending a college or university has the legal status of a business invitee. Stanton et al. v. University of Maine System, 773 A. 2d 1045, 1046* (Me. 2001)

- *duty to act* - obligation to take some action to prevent harm to another and for failure of which there may or may not be liability in tort depending upon the circumstances and the relationship of the parties to each other (e.g., duty to warn).

- *duty of care* (a.k.a. due care) - that degree of care that a reasonable person can be expected to exercise to avoid harm reasonably foreseeable if such care is not taken.

- *foreseeability* - the ability to see or know in advance; e.g., the reasonable anticipation that harm or injury is a likely result from certain acts or omissions. In tort law, the foreseeability element of proximate cause is established by proof that the actor (administrator) as a person of normal intelligence and prudence should have anticipated danger to others resulting from his negligent act (often an act of omission rather than commission). The term "foreseeability" refers to *that which is reasonable to expect, not merely what might conceivably happen.*

- *implied contract* - An implied contract is one not created by implicit agreement of the parties, but inferred by the law as a matter of reason and justice. An implied contract is an agreement that can be inferred from intention of the parties and the ordinary course of human interaction and the common understanding of men.

- *negligence* - Negligence is the failure to use such care as a reasonably prudent and careful person would use under similar circumstances. Negligent conduct falls below the standard established by law for the protection of others against unreasonable risk of harm; it is a departure from behavior expected of a prudent person under like circumstances. The doctrine of negligence rests on the duty of every person to exercise due care in his conduct towards others from which injury may result.

- *probable cause* - reasonable cause; having more evidence for than against. A reasonable ground for belief in certain alleged facts.

- *proximate cause* - That which, in a natural and continuous sequence, unbroken by any intervening cause, produces injury, and without which the result would not have occurred. The last negligent act contributory to an injury, the dominant, moving, or producing cause of injury or death.

- *reasonable duty to protect* - the responsibility of colleges and universities to protect students, faculty, and staff against danger, especially criminal acts by other students and non-students. Reasonable duty encompasses responsibility and accountability but not always legal liability. Plaintiffs in these cases usually assert negligence by the institution in not providing reasonable protection. Defendants usually claim that the criminal actions leading to injury or death were not foreseeable. Courts approach reasonable duty cases with caution because of the difficulty in determining responsibility.

- *special relationship* - a relationship between the actor and another party which imposes a duty upon the actor to control the other person's conduct; or a relationship between the actor and the other person which gives to the other a right of protection. It is the latter of these two possibilities that arises most often in testimony about campus safety breaches. When avoidance of foreseeable harm requires the defendant to control the conduct of the perpetrator, or to warn the potential victim(s) of dangerous conduct, the law imposes liability only if the defendant bears a special relationship to the dangerous person or to the potential victim(s). The relationship between a psychiatrist and his potentially violent patient is an example of such a relationship. The relationship between college administrators and students normally does not meet the legal requirements of a "special relationship" (Black, 1990).

It is imperative that administrators base pertinent policies and procedures on the aforementioned principles for at least two reasons. First and foremost, adherence to the spirit of the principles leads to a safer, more secure campus for students and staff. Second, good-faith compliance with the principles can mitigate damage claims against the institution in the event of a tragedy on campus and subsequent litigation that ends with an unfavorable ruling by the court. In summary, basing safety policies and procedures on these ten legal principles is the moral thing to do; it is also the prudent action to take.

Summary

Personal safety is the most basic of rights extended to American citizens, a fact acknowledged in the Declaration of Independence. In light of the terrorist attacks in the United States on September 11, 2001, and continuing threats at home and abroad, many Americans are concerned about their safety and the security of the nation. That concern extends to college and university campuses where millions of students congregate daily. The very nature of post secondary institutions makes them potentially unsafe places. In order to carry out their missions, college campuses have to be open and easily accessible. Administrators and faculty no longer function *in loco parentis* and have little control over the conduct and lifestyle of students. These realities can make campuses vulnerable to crime and place unwary students at peril.

In response to an increasing focus on the importance of campus safety, Congress passed the Crime Awareness and Campus Security Act of 1990 that requires post secondary institutions to prepare and submit annual crime reports to the Department of Education and other constituents. Crime statistics compiled since 1992 indicate that campuses are relatively safe places. Although non-violent crimes like burglary and motor vehicle theft are fairly common on campuses, students on campus are much less likely to become victims of violent crimes than are persons in the general population.

Based on this review of post secondary campus safety, the following conclusions are warranted:

- With the demise of *in loco parentis*, post secondary institutions are not normally responsible for the conduct or the safety of their students.
- As "business invitees" to the campus, students are entitled to a reasonable duty of care from the institution.
- When the incident that causes harm is foreseeable, the institution can be held liable.
- Employee negligence renders the institution liable for damages.
- Post secondary institutions have a reasonable duty to protect students and employees from the criminal acts of other students and non-students.
- The relationship between college administrators and students normally does not meet the legal definition of a "special relationship."
- *Post secondary institutions are not insurers of the safety of their students; therefore, plaintiffs in safety cases must demonstrate that the institution's failure to provide reasonable care was a proximate cause of their injury (Bradshaw v. Rawlings et al., 612 F. 2d 135 (1979).*

> **"The campus crime statistics collected by the U.S. Department of Education [during the previous reporting period] suggest that our nation's college campuses are safe. In nearly every category of crime for which data were collected, college campuses showed lower incidence of crime than comparable data for the nation as a whole."**
>
> *The Incidence of Crime on the Campuses of U.S. Post Secondary Education Institutions: A Report to Congress.* United States Department of Education, Office of Post Secondary Education, January 18, 2001.

Recommendations

The following recommendations are offered to assist administrators and board members in their continuing efforts to ensure safety on college and university campuses:

- Make personal safety a priority at the institution. Educate all students on ways to protect themselves.
- Base safety policies and procedures on the ten legal principles reviewed in this paper. Courts use these principles as benchmarks as they deliberate the facts in campus safety cases.

- Demonstrate a good faith effort to secure the campus through the following: physical barriers, alarm systems, panic buttons, campus call boxes, ample and bright lighting, restricted access to parking lots, video surveillance, and increased police patrols.
- Contract with a risk management consultant to perform a comprehensive safety assessment and develop a campus safety plan based on the assessment. The institution's major insurance carrier may be willing (eager) to support this effort. Incorporate the safety plan into the long-range facilities plan.
- Require architects and engineers to consider personal safety in the planning process for all future construction projects.
- Facilitate improved cooperation between campus police and local law enforcement agencies.
- Include safety seminars in required staff development activities.
- Enlist the support of student government and other leadership organizations in promoting a safe and secure learning environment.
- Develop anti-hazing policies or reiterate those that already exist. Ask fraternities and sororities to help eliminate hazing. Reward them for doing so.
- Appoint a campus safety committee composed of students, faculty, administrators, staff, and at least one risk manager or safety consultant.
- Finally, prepare for the unexpected and unthinkable; appoint a Crisis Management Team and develop a Crisis Management Plan. Hope for the best but prepare for the worst. In the end, that may be the best way to protect the institution from liability if there is a tragedy on the campus.

References

1. American Council on Education, telephone conversation with Timothy J. McDonough, Director of Public Affairs, on August 12, 2002.

2. Black, Henry Campbell. *Black's Law Dictionary*. St. Paul: West Publishing Company, 1990.

3. 34 C.F.R. Section 668.46.

4. The Constitution of the United States of America.

5. The Crime Awareness and Campus Security Act of 1990 (also known as the Clery Disclosure Act). 20 U.S.C. 1001, P.L. 101-542.

6. The Declaration of Independence.

7. The Family Educational Rights and Privacy Act. 20 U.S.C. 1232g.

8. The Higher Education Act of 1965, Section 485, 20 U.S.C. 1092.

9. The Higher Education Amendments of 1998.

10. Kern Alexander and M. David Alexander. *American Public School Law*. Stanford, CT: Wadsworth/Thomson Learning, Fifth Edition, 2001.

11. Restatement (Second) of Torts, Section 302 B (1965).

12. Restatement (Second) of Torts, Section 315 (1977).

13. Servicemen's Readjustment Act of 1944.

14. Joan S. Stark and Lisa R. Lattuca. *Shaping the College Curriculum: Academic Plans in Action*. Boston: Allyn and Bacon, 1997.

15. *Webster's Encyclopedic Unabridged Dictionary of the English Language*. New York: Gramercy Books, 1989.

Cases Cited

1. *Gott v. Berea College, 161 S. W. 204, 206 (Ky. 1913).* College authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the [students]. We are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their [students] that a parent could for the same purpose. Whether the rules or regulations are wise or their aims [are] worthy is a matter left solely to the discretion of the authorities or parents, as the case may be. *In the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.*

2. *Tinker v. Des Moines Independent Community School District et al.*, 393 U.S. 503 (1969). A prohibition against expression of opinion, without any evidence that the rule is necessary to avoid substantial interference with school discipline or the rights of others, is not permissible under the First and Fourteenth Amendments.

3. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). Surely, it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.

4. *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Educators do not violate students' First Amendment rights by exercising editorial control over school-sponsored newspapers as long as there is a legitimate pedagogical reason to prohibit such expression. Should a school have legitimate concerns about student speech in a newspaper, it is not obligated to provide resources to fund that speech. Freedom of speech in student newspapers is not governed by the "material and substantial disruption" standard espoused in *Tinker*.

5. *Schultz v. Gould Academy*, 332 A. 2d 368 (Me. 1975). The night watchman at the boarding school, who had good reason to believe that a male intruder had entered the girls' dormitory, could not be faulted for not searching the upper floors because he was not permitted to enter that area. However, under the circumstances, he should have alerted officials who were authorized to search the dormitory before leaving the site to continue his rounds. His failure to do so was a proximate cause of the plaintiff's injuries and subjected his employer to liability for damages.

6. *Bradshaw v. Rawlings et al.*, 612 F. 2d 135 (1979). The modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades. Trustees, administrators, and faculties have been required to yield to the expanding rights of their students. Rights formerly possessed by college administrators have been transferred to students. College students are no longer minors; they are regarded as adults in virtually every phase of academic and public life.

7. *Mullins v. Pine Manor College et al.*, 449 N.E. 2d 331 (Mass. 1983). Colleges generally undertake *voluntarily* to provide their students with protection from the criminal acts of third parties. Pine Manor undertook such a duty, and this undertaking was not gratuitous. Students were charged for the service either through their tuition or a dormitory fee. Reasonable security is an indispensable part of the *bundle of services* which all colleges, including Pine Manor, provide their students.

8. *Eiseman v. State of New York*, 511 N.E. 2d 1128 (N.Y. 1987). The university did not breach its statutory duty when it accepted a convicted felon into a rehabilitation program for the disadvantaged. The felon had a long history of drug abuse and mental instability. Subsequently, he raped and murdered one student and stabbed a non-student. The court ruled that the felon's release to participate in the rehabilitation program was a discretionary function within the state's absolute immunity.

9. *Brown v. Florida State Board of Regents*, 513 So. 2d 184 (Fla. App. 1 Dist. 1987). The wrongful death claim filed by the representatives of a deceased university student was not barred by sovereign immunity; once the board of regents assumed responsibility for operating the lake facility and distributing recreational equipment, the board could no longer claim immunity.

10. *Furek v. The University of Delaware*, Del. Supr., 594 A. 2d 506, 507 (1991). Although the university no longer stands *in loco parentis* to its students, it has a duty to regulate and supervise foreseeably dangerous activities on its premises; that duty extends to negligent or intentional activities of third parties that harm others (e.g., the conduct of fraternity members during initiation ceremonies).

11. *Nero v. Kansas State University*, 861 P. 2d 768 (Kan. 1993). Foreseeability is the main factor that courts consider when assessing reasonable duty. Other factors include moral blame, preventing future harm, and burden on the university and larger community.

12. *Kleinknecht v. Gettysburg College, a corporation*, 989 F. 2d 1360 (3rd Cir. 1993). Gettysburg College owed Drew R. Kleinknecht, a student lacrosse player, a duty of care under Pennsylvania law because of the special relationship between the college and its student athletes. Kleinknecht had been recruited as an intercollegiate athlete to represent the institution in athletic competition.

13. *Johnson v. State of Washington*, 894 P. 2d 1366 (Wash. App. Div. 1 1995). State university student who was raped near her dormitory was entitled to status as a business invitee; thus, the university had a duty to use reasonable care for her safety. In negligence action, a criminal act by a third party is not an *intervening cause* for exoneration if it was reasonably foreseeable. In tort law, an intervening cause is an act of an independent agent that destroys the causal connection between the defendant's negligent act and the plaintiff's injury. The intervening act becomes the immediate (proximate) cause of injury. Consequently, damages are not recoverable from the defendant because the original wrongful act is not the proximate cause of injury.

14. *Gross v. Family Services Agency, Inc.*, 716 So. 2d 337 (Fla. App. 4 Dist. 1998). Student who was sexually assaulted while attending a mandatory internship stated a valid cause of action in negligence against the university. Facts in the case demonstrated that university officials assigned her, without warning, to an internship site that they knew was unreasonably dangerous and presented unreasonable risk of harm.

15. *Robertson v. State Department of Planning and Control*, 747 So. 2d 1276 (La. App. 2 Cir. 1999). University's duty to provide a safe campus did not extend to protecting a student from his deliberate act of recklessness in climbing on the roof of the campus natatorium. Any prudent person would recognize that climbing on the roof posed an unreasonable danger and was an unlawful trespass.

16. *Posecai v. Wal-Mart Stores, Inc.*, 752 So. 2d 762 (La. 1999). There is generally no duty to protect others from the criminal activities of third parties. Plaintiff has the burden of establishing the duty that a business owed to protect its customers from criminal acts of third parties under the circumstances. In determining whether a business owes a duty of care to its customers, the most important factor to be considered is the existence,

frequency, and similarity of prior incidents on the premises, but the location and condition of the property should also be taken into consideration.

17. *Coughlan v. Beta Theta Pi Fraternity*, 987 P. 2d 300 (Idaho 1999). Plaintiff was a college sorority member who was injured when she fell from the fire escape of the sorority house while intoxicated. Under provision of the Dram Shop Act, she was barred from recovery against the fraternities and sororities that had provided the alcohol for her. Dram Shop liability applies to licensed vendors that sell alcohol to consumers who then commit torts while intoxicated.

18. *Apffel et al. v. Huddleston et al.*, 50 F. Supp. 2d 1129 (D. Utah 1999). College officials did not owe a duty of care to a freshman to protect him from the inherent danger of climbing sandstone cliffs; consequently, they could not be held liable for the student's death resulting from his fall. The college did not violate Apffel's Fourteenth Amendment rights by planning the freshman party in a state park near the cliffs.

19. *Nannay v. Rowan College et al.*, 101 F. Supp. 2d 272 (D. N. J. 2000). State college dean's offer of emergency housing to adult student who had been abused by her boyfriend, and college radio station manager's offer of help, did not create a state duty to protect the student; the state did not restrict student's freedom or access to sources of help. Neither the officials' conduct nor the allegedly lax campus security exacerbated the danger. Officials' actions were objectively reasonable, and thus the officials enjoyed qualified immunity in the Section 1983 action.

20. *Stanton et al. v. University of Maine System*, 773 A. 2d 1045 (Me. 2001). The owner of premises owes a legal duty to his business invitees to protect them from those dangers reasonably to be foreseen. A student attending an educational institution has the legal status of a business invitee.

21. *Williams v. State of Louisiana*, 786 So. 2d 927 (La. App. 2 Cir. 2001). A university has a duty to implement reasonable measures to protect its students in dormitories from criminal acts when those acts are foreseeable. The university can be found negligent if it knew or should have known that instances of violence were likely to occur on campus and yet it took no preventive actions to protect students and staff.

22. *Baldwin v. Zoraldi*, App., 176 Cal. Reporter 809. A state statute prohibiting consumption of alcoholic beverages on campus property does not impose upon the university a duty to enforce the law.

23. *Relyea v. State of Florida et al. and Mahnke v. State of Florida et al.*, Fla. App., 385 So. 2d 1378. As a basic principle of law, a property owner has no duty to protect one on his premises from criminal attack by a third person. Even though one's negligence may be a cause in fact of another's injury, he will not be held liable if an intervening and unforeseeable criminal act also causes the injury.

Pot Addiction and Parental Friction: Emotional Disturbances, Conduct Disorders, and Unilateral Placements for Drug-Abusing Students Under the IDEA

48th Annual Conference of the Education Law Association
November 14-16, 2002
New Orleans, LA

David S. Doty, Ph.D.
Duff, Turner, White & Boykin, LLC
3700 Forest Drive, Suite 404
P.O. Box 1486
Columbia, SC 29202
(803) 790-0603
ddoty@ddtwb.com

"This is your brain (show egg). This is your brain on drugs (show egg frying in pan)."

--Public service television advertisement by the Partnership for a Drug-Free America.

"The term 'child with a disability' means a child—(i) with mental retardation, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (hereinafter referred to as 'emotional disturbance'), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and (ii) who, by reason thereof, needs special education and related services."

–Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1401(3).

I. Introduction

Among educators and attorneys, it is well known that litigation under the Individuals with Disabilities Education Act (IDEA) has been, and continues to be, one of the most active areas of legal conflict in American public schools.[1] In fact, certain subsets of IDEA litigation have, in recent years, experienced what might be called explosive growth. One of these subsets involves parental demands for tuition reimbursement for private school placements; the number of published administrative and judicial tuition reimbursement decisions "has increased relatively steadily and steeply [from] . . . 1978 to 2000."[2]

Yet while several scholars have examined the volume, and outcome, of tuition reimbursement cases, there has been little written about the "nuts and bolts" of unilateral placement disputes. This paper attempts to partially fill that gap, and add to the existing literature,[3] by examining unilateral placements for drug-abusing and delinquent students, placements which have the potential to be the source of great consternation for school districts if aggressive steps are not taken to prevent, and establish proper defenses against, them.

Part II of the paper will provide some background, and predictions, regarding private placements for students engaged in drug abuse or serious delinquency. Part III will review relevant statutes and case law on the major legal issues connected with such placements, including child find, definition of disability, FAPE, appropriateness of private placement, notice

---

[1] See, e.g., Perry A. Zirkel, The "Explosion in Education Litigation: An Update, 114 **Educ. L. Rep.** 341 (1998); Perry A. Zirkel, Tipping the Scales, **American Sch. Bd. J.**, Oct. 1997, at 36, 37; What the Numbers Say About Special Education Litigation, **The Special Educator**, May 27,1995, at 325, 334-335.

[2] Thomas A. Mayes & Perry A. Zirkel, Special Education Tuition Reimbursement Claims: An Empirical Analysis, 22 **Remedial & Special Educ.** 350, 355 (November/December 2001).

[3] See, e.g.,Cindy L. Skaruppa, Ann Boyer, & Oliver Edwards, Tuition Reimbursement for Parent's Unilateral Placement of Students in Private Institutions: Justified or Not?, 114 **Educ. L. Rep.** 353 (1997); Allan G. Osborne, Reimbursement for Unilateral Parental Placements in Unapproved Private Schools Under IDEA, 90 **Educ. L. Rep.** 1 (1994); Dixie Snow Huefner, Special Education Residential Placements with Severe Emotional Disturbances: The Implications of Recent Ninth Circuit Cases, 67 **Educ. L. Rep.** 397 (1991).

BEST COPY AVAILABLE

requirements, and equitable considerations. Finally, Part IV of the paper will conclude with some recommendations as to how the IDEA should be rewritten by Congress, and some practical suggestions for school officials responsible for the delivery of special education.

II. Background

One of the hottest areas in special education involves parental demands for payment of tuition costs associated with residential treatment programs for students with serious emotional or behavioral problems. Over the past few years, school districts across the country have faced these demands, which are disastrous regardless of the outcome given the time, money, and human capital districts must spend to defend high-dollar claims for private residential care.

What is most troubling is that tuition reimbursement demands of this type may only become more common, for several reasons. First, although some progress has been made,[4] drug use among American teenagers remains at unacceptably high levels. According to the World Health Organization, 41% of 10th graders in the United States have tried marijuana, compared with just 17% of 10th graders in Europe, and 23% of American 10th graders have used other illicit drugs, compared with just 6% of Europeans.[5] Other recent studies, conducted by the U.S. Department of Health and Human Services, report that more and more students are using steroids, Ecstasy, and heroin.[6]

Second, it is well documented by medical professionals that adolescents who abuse illicit drugs demonstrate impaired functioning in school and other settings. In one published study, two scientists concluded:

> Students who use illicit drugs show deficits in school performance, quality of family relationships, and health and increased psychological symptoms. Compared with nonusers, they are more delinquent and more actively involved with their peers and live in social environments in which the perceived use of drugs by other adolescents and parents is more extensive. Delinquency and extent of perceived drug use consistently increase with each higher stage of use.[7]

Third, an increasing number of teenagers who use drugs are developing serious addictions, but few who need treatment actually receive it. According to recent data, approximately 1.1 million children 12-17 years old have problems with drugs and alcohol, but only about 122,000 of them received treatment in 2000.[8] Because drug treatment programs are costly and scarce, often the only students to get treatment are those whose parents have the financial means to send their children away.[9]

---

[4] Michael Kranish, More Students Say Schools Drug Free, **Boston Globe**, Aug. 21, 2002, at A2.

[5] U.S. Teens Use Drugs More, **Arizona Republic**, Feb. 21, 2001 http://www.arizonarepublic.com/cgi-bin/print-php3

[6] Report: Teen Drug Use Unchanged, **Washington Post**, Dec. 15, 2000, at A6.

[7] Denise B. Kandel & Mark Davies, High School Students Who Use Crack and Other Drugs, 53 **Archives General Psychiatry** 71 (January 1996).

These factors combined may very well result in more attempts by parents to use the IDEA as a vehicle to obtain funding for residential treatment programs. When called upon to weigh in on these disputes, hearing officers and courts must carefully balance the rights of students with disabilities against the rights, and obligations, of school officials to make accurate eligibility determinations and provide appropriate programs for students in the least restrictive environment.

III. High Stakes Placements: The Legal Issues Connected with Unilateral Residential Placements

Parental demands for tuition reimbursement present a complex array of issues, and the law on many of them is unsettled, because there is either a lack of court precedent or a split among the courts in the decisions that have been rendered. Nevertheless, knowledge of the law as it has evolved to date will hopefully be useful to legal counselors and school leaders desiring to minimize liability.

A. The *Burlington/Carter* Framework

The basic principles governing tuition reimbursement under the IDEA are found in two U.S. Supreme Court cases, School Committee of Town of Burlington v. Department of Educ.[10], and Florence County Sch. Dist. Four v. Carter.[11] In Burlington, the Court established a two-pronged test to be used in deciding whether parents are entitled to tuition reimbursement under the IDEA, stating: "In a case where [1] a court determines that a private placement desired by the parents was proper under the Act and [2] that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school." [12]

---

[8] Donna Leinwand, Youth Need More Drug Programs, Study Shows, **USA Today**, Feb. 7, 2002 http://www.usatoday.com/news/washdc/2002/02/08/usat-treatment.htm. See also, Quynh-Giang Tran, Study Details Teens' Drug Use, **Boston Globe**, June 14, 2002, at A18 (noting that one out of every six teenagers in the Boston area abuses drugs or alcohol or is so dependent on these substances that in-patient treatment may be required).

[9] Id. See also, James Thalman, Only a Fifth of Addicts Treated, **Deseret News**, Aug. 13, 2002 http://www.deseretnews.com/dn/print/1,442,405023886,00.html (noting that only 22,000 of 80,000 drug addicts in Utah receive necessary treatment, and that many insurance plans only cover a traditional approach, involving 30 days of in-patient hospital treatment).

[10] 471 U.S. 359 (1985).

[11] 510 U.S. 7 (1993).

In Carter, the Court reiterated this test, emphasizing that parents who unilaterally change their child's placement without the consent of school officials, "'do so at their own financial risk,'" and that they are "entitled to reimbursement *only* if a federal court concludes both that the public placement violated the IDEA and that the private school placement was proper under the Act."[13] Moreover, Carter held that parents are not automatically barred from reimbursement if the private school in which they unilaterally place their child fails to meet state education standards.

B. **Alleged Denial of FAPE by Failure to Comply with "Child Find"**

Many of the reimbursement decisions concerning children with drug abuse or delinquency problems involve allegations that school officials failed to evaluate, or identify, in a timely manner, a student's emotional disturbance ("ED"). Specifically, districts are often charged with violating IDEA's "child find" mandate, which provides that States and school districts must ensure that:

> All children with disabilities residing in the State, including children with disabilities attending private schools, regardless of the severity of their disabilities, and who are in need of special education and related services, are identified, located, and evaluated and a practical method is developed and implemented to determine which children with disabilities are currently receiving needed special education and related services.[14]

It is not clear from this language whether a school district owes a specific "child find" duty to each eligible child with a disability, as opposed to simply a general duty to make the public and parents aware of the services available in the district. However, most hearing officers and courts have held that the "child find" duty does run to individual children, finding that "[t]he individual right to a free appropriate public education for a child who is classified for special education purposes is meaningless if the child has no comparable right to demand classification."[15]

At the same time, the "child find" duty is "in no way absolute."[16] School officials must at least have knowledge of the disability, which "may be inferred from written parental concern, the behavior or performance of the child, teacher concern, or a parental request for an evaluation." [17]

---

[12] Burlington, 471 U.S. at 370.

[13] Carter, 510 U.S. at 15 (quoting Burlington, 471 U.S. at 373-74).

[14] 20 U.S.C. § 1412(a)(3); 34 C.F.R. § 300.125.

[15] Davis County School District, 102 LRP 4246 (SEA UT 1998) (citing Clay T. v. Walton County Sch. Dist., 25 IDELR 409 (M.D. Ga. 1997). See also Robertson County Sch. Sys. V. King, 99 F.3d 1139 (6th Cir. 1996); Round Rock Indep. Sch. Dist., 25 IDELR 336 (SEA TX 1996); Eagle Point Sch. Dist., 18 IDELR 1268 (SEA OR 1992)).

[16] Wiesenberg v. Board of Educ. of Salt Lake City Sch. Dist., 181 F.Supp.2d 1307, 1311 (D. Utah 2002).

Unfortunately, in the absence of a specific request or referral for evaluation, it is not clear how much evidence of disability school officials must observe before the duties to evaluate, and classify, kick in. One frequently cited case in this area, Clay T. v. Walton County Sch. Dist.[18], stands for the proposition that school officials do not violate the "child find" mandate unless they overlook "clear signs" of disability and offer no rational justification for deciding not to evaluate. A somewhat different standard was recently articulated by a federal court in Hawaii, which stated that the duty "is triggered when the [school] has reason to suspect a disability, and reason to suspect that special education services may be needed to address that disability."[19] Regardless of the confusion over the quantum of knowledge required, it is probably safe to say that the "child find" duty is not triggered simply by notice that a child has an impairment. School officials must be put on notice that a child has a disability, and that such disability is causing an adverse effect on the child's education.

School officials should thus be aware of this threshold issue, particularly if a unilateral placement dispute ends up in litigation. Several districts have successfully defeated reimbursement demands on grounds that school officials had no prior notice of either the student's impairment or its adverse effect on the student's school performance. See, e.g., Montgomery County Pub. Sch., 102 LRP 19074 (SEA MD 2002) (denying reimbursement because while school officials knew student had been hospitalized prior to withdrawal from district and enrollment in residential placement, they did not know the nature of the psychotic episode or have any information that the student was depressed or had ADD); Katherine S. v. Umbach, No. Civ. A. 00-T-982-E, 2002 WL 226697 (M.D. Ala. 2002) (denying reimbursement for tuition at the Elan School in Maine because school officials had no reason to suspect that student needed special education, because despite diagnoses of ODD, ADHD, asthma, depression, and conflict with parents, student was "vivacious" and academically successful); West Chester Area Sch. Dist., 32 IDELR 275 (SEA PA 2000) (school officials had no reason to suspect that student with depression and behavior problems at home was disabled simply because her grades fluctuated and declined); Hoffman v. East Troy Community Sch. Dist., 38 F.Supp.2d 750 (E.D. Wis. 1999) (teachers' observations that student fell asleep in class, had poor classroom performance, and failed one class did not give rise to suspicion that student was emotionally disturbed); Davis County Sch. Dist., 102 LRP 4246 (SEA UT 1998) (district did not have child find duty regarding a student who, despite parental conflict and drug use outside of school, appeared emotionally stable and academically successful in the classroom).

---

[17] Id. (citing 20 U.S.C. § 1415(k)(8)(B)(i-iv)).

[18] 25 IDELR 409 (M.D. Ga. 1997).

[19] Department of Educ., State of Hawaii v. Cari Rae S., 158 F.Supp.2d 1190, 1194 (D. Hawaii 2001).

On the other hand, school officials who ignore evidence of disability and related poor school performance do so at their peril. See, e.g., Department of Educ., State of Hawaii v. Cari Rae S., 158 F.Supp.2d 1190 (D. Hawaii 2001) (ordering tuition reimbursement as the result of "child find" violation where school officials ignored student's dramatically declining grades and escalating disciplinary problems); Round Rock Indep. Sch. Dist., 25 IDELR 336 (SEA TX 1996) (ordering partial reimbursement on grounds that district should have evaluated student, who exhibited various behavioral problems, including defiance of parents, truancy, car theft, running away from home, and substance abuse, to determine whether student met the criteria for serious emotional disturbance in addition to being socially maladjusted); Lake Washington Sch. Dist. No. 414, 257 IDELR 611 (OCR 1985) (finding that district's blanket policy of refusing evaluations for alcohol and drug addicted students was discriminatory, because even though substance abuse does not qualify students for special education under the IDEA, such students still may have disabilities under Section 504).

C. Defending the IEP

If a student with drug abuse or delinquency problems has not been classified as a student with a disability before his parents unilaterally place him in a residential setting, virtually the only way the parents can meet the first prong of the Burlington test (showing that the district denied FAPE) is to prove a "child find" violation. However, it sometimes occurs that a student who has been previously identified with a disability is suddenly removed from the school system and placed unilaterally by his parents in a residential facility. In that case, school officials must be prepared to defend the IEP that existed at the time of the student's exit from the district.

1. Procedural Defense #1: Parental Failure to Provide 10-Day Prior Written Notice

This can be done on both procedural and substantive grounds. Procedurally, school officials can assert that reimbursement should be denied if the parents suddenly, and without prior notice, withdrew their child from the district without objecting to the IEP. The IDEA regulations explain:

> (d) Limitation on reimbursement. The cost of reimbursement [for private school placement] . . . may be reduced or denied—
> (1) If—
> (i) At the most recent IEP meeting that the parents attended prior to the removal of the child from the public school, the parents did not inform the IEP team that they were rejecting the placement proposed by the public agency to provide FAPE to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
> (ii) At least ten (10) business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in paragraph (d)(1)(i) of this section.[20]

BEST COPY AVAILABLE

---

[20] 34 C.F.R. § 300.403(d).

Interestingly, courts have held that this provision applies only where the student has previously been deemed eligible for special education and an IEP proposed or implemented. See Sandler v. Hickey, 246 F.3d 667, 2001 WL 227307 (4th Cir. 2001) (Maryland equivalent of federal prior notice requirement did not apply where no IEP had been proposed before parents enrolled child in the Grove School). Moreover, the plain language of this regulation clearly does not require a denial of reimbursement if parents fail to provide proper prior notice of their objections to the IEP and intentions to place their child in a private school at public expense; it states only that the cost of reimbursement "may be reduced or denied" as the result of the parents' lack of communication. Nevertheless, at least one hearing officer has ruled that similar notice provisions under Maryland law are mandatory where an IEP is in dispute, and concluded that "the Parents' failure to comply with those requirements cripples any claim to reimbursement, regardless of whether the proposed placement provided FAPE or not." Prince George's County Pub. Sch., 28 IDELR 680 (SEA MD 1998).

Indeed, even when denying reimbursement on this basis is viewed as discretionary, most courts and hearing officers have ruled in favor of schools, dismissing or reducing reimbursement claims where parents fail to give timely notice of their intentions. See, e.g., Pollowitz v. Weast, 34 IDELR 171 (4th Cir. 2001) (upholding dismissal of tuition reimbursement claims where parents' letter to school officials merely informed the district of the student's private placement without indicating that the proposed IEP was unsuitable); M.C. v. Voluntown Bd. of Educ., 226 F.3d 60 (2nd Cir. 2000) (holding that child was barred from reimbursement for the costs of his psychological treatment, where child's parents failed to raise any issue with respect to the psychological services provided in the IEPs until after the treatment had ended); James v. Upper Arlington City Sch. Dist., 228 F.3d 764 (6th Cir. 2000) (holding that parents could not recover private school tuition expenses retroactively between the initial removal of child from district and date they subsequently sought IEP, although they could pursue reimbursement claim for tuition costs after date that IEP was sought); Lower Merion Sch. Dist., 33 IDELR 139 (SEA PA 2000) (denying reimbursement because parents engaged in "unfair gamesmanship," removing the child from school without notice several months after agreeing to an IEP that "provided every detail they demanded," and then "delaying the scheduled hearing for the remainder of the school year without any overriding justification."); Upper Darby Sch. Dist., 33 IDELR 22 (SEA PA 2000) (rejecting reimbursement claim because parents failed to provide timely written notice, including their specific concerns, ten business days before enrolling their child in a private school); Nein v. Greater Clark County Sch. Corp., 95 F.Supp.2d 961 (S.D. Ind. 2000) (reducing by one half the reimbursement originally ordered where parents failed to comply with prior notice requirements)

2. Procedural Defense #2: Parents' Failure to Object to IEP Prior to Unilateral Placement

In addition, a number of courts, while not relying on the 10-day notice requirements in IDEA '97, have nonetheless dismissed reimbursement claims because of the parents' failure to object to the IEP and provide school officials with an opportunity to remedy concerns prior to unilaterally placing a child in a private setting. The general principle here is that "[s]chool boards must be given adequate notice of problems if they are to remedy them, and must be given sufficient time to respond to those problems before they can be held liable for failure to act." Combs v. School Bd. of Rockingham County, 15 F.3d 357, 363-64 (4th Cir. 1994). See also Alexander K. v. Virginia Bd. of Educ., 30 IDELR 967 (E.D. Va. 1999) (denying reimbursement where parents chose to withdraw the student rather than expressing their disagreement in a renewed IEP or requesting an administrative review or hearing at the time); In Re Student With a Disability, 30 IDELR 97 (SEA DEL 1999) (dismissing reimbursement claims because parent provided no notice of disagreement with student's 8th grade educational placement or his proposed high school placement prior to withdrawing student and enrolling him in private school); Board of Educ.of Avon Lake City Sch. Dist., 9 F.Supp.2d 811 (N.D. Ohio 1998) (denying $71,000 reimbursement claim for tuition at Elan School in Maine because parents "failed or neglected to take appropriate action to express their dissatisfaction with the District's programs or to inform the District that they were withdrawing [student] from school."); Wise v. Ohio Dep't of Educ., 80 F.3d 177 (6th Cir. 1996) (holding that parents were not entitled to reimbursement because they unilaterally changed their child's educational placement without ever making a formal complaint to the district or asking the district to place their child in a residential care facility); Mary P. v. Illinois State Bd. of Educ., 934 F.Supp. 989 (N.D. Ill. 1996) (denying parents reimbursement between April 1991, when they were denied services, and January 1992, when they first registered dissatisfaction with the district); Round Rock Indep. Sch. Dist., 25 IDELR 336 (SEA TX 1996) (holding that parents waived right to reimbursement between the spring of 1994, when they signed student out, without notice to the district that they wanted a different program, and January 1995, when they informed the district they wanted reimbursement for residential treatment program); Evans v. District No. 17 of Douglas County, 841 F.2d 824 (8th Cir. 1988) (holding that parent was not entitled to reimbursement where she expressed concerns about child's public school placement but never formally or informally asked district to make a change of placement; "school officials were never given the opportunity to make (or refuse to make) changes because the parents unilaterally removed their child from the school district."); Lake Washington Sch. Dist. No. 414, 257 IDELR 611 (OCR 1985) (finding that district was not required to fund an out-of-district placement that the parents selected unilaterally, without consultation with the district).

3. Procedural Defense #3: Parents' Delay in Requesting Due Process

A third procedural defense school officials may need to consider is laches, that is, the prejudicial effect of the parents' delay in pursuing due process against the district. A distinct body of case law has begun to emerge holding that parents are not entitled to an IDEA remedy when they wait long periods of time before seeking tuition reimbursement in due process proceedings; courts reaching this conclusion have relied on the following reasoning:

> [M]ere notice of parental "dissatisfaction" does not alone put the Board on reasonable notice that the parents will challenge a particular IEP in the future and seek reimbursement for an interim unilateral placement in a private institution. Absent initiation of review proceedings within a reasonable time of a unilateral decision to transfer a child to a private institution, a school district would not know to continue to review and revise an IEP, and the court would be left to hazard conjecture or hypothesis as to what the Board of Education might have proposed if it had been informed of the parents' continued intent to pursue an appropriate education for their child within the school district. We, of course, recognize that the school district has the duty in the first instance to provide an appropriate IEP, and moreover, to demonstrate by a preponderance at a due process hearing that the IEP it offered was indeed appropriate. With that foremost in mind, we must nevertheless also recognize that as a practical reality, and as a matter of procedural law, . . ., the right of review contains a corresponding parental duty to unequivocally place in issue the appropriateness of an IEP. This is accomplished through the initiation of review proceedings within a reasonable time of the unilateral placement for which reimbursement is sought. We think more than two years, indeed, more than one year, without mitigating excuse, is an unreasonable delay.

Bernardsville Board of Educ. v. J.H., 42 F.3d 149, 158 (3rd Cir. 1994). See also White v. School Bd. of Henrico County, 549 S.E.2d 16 (Va. Ct. App. 2001) (holding that where parent signed and consented to IEP, her objection to its implementation one year later was untimely, and warranted denial of reimbursement); L.K. v. Board of Educ. for Transylvania County, 113 F.Supp.2d 856 (W.D.N.C. 2000) (denying reimbursement where parent did not initiate due process hearing until more than two years after unilaterally placing child in private school); Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80 (3rd Cir. 1999) (holding that parents could not recover "tuition reimbursement for the period preceding the parents' request for a due process hearing."); Board of Educ. of the City Sch. Dist. of the City of New York, 29 IDELR 143 (SEA NY 1998) (denying tuition reimbursement for the 1996-97 school year where parent waited over 15 months between unilateral placement and her request for due process); Phillips v. Board of Educ. of Hendrick Hudson Sch. Dist., 25 IDELR 500 (S.D.N.Y. 1997) (holding that the equitable doctrine of laches barred parents from reimbursement for the first three years of child's private placement where parents did not file a due process complaint until five years after the private placement); Garland Indep. Sch. Dist. v. Wilks, 657 F.Supp. 1163 (N.D. Tex. 1987) (holding that parent was not entitled to reimbursement for expenses of residential placement incurred prior to her challenge of child's IEP).

4. Substantive Defenses: Proving the Appropriateness of the IEP

Of course, whether or not school officials can rely on procedural defenses, they will almost certainly have to prove the appropriateness of the IEP in order to prevail in a tuition reimbursement case. Two points bear emphasizing here.

First, "the measure and adequacy of an IEP can only be determined as of the time it is offered to the student, and not at some later date. . . . Neither the statute nor reason countenance 'Monday Morning Quarterbacking' in evaluating the appropriateness of a child's placement." Carlisle Area Sch. v. Scott P., 62 F.3d 520, 534 (3rd Cir. 1995), cert. denied, 517 U.S. 1135 (1996). In other words, "[a]n IEP is a snapshot, not a retrospective." Roland M. v. Concord Sch. Committee, 910 F.2d 983, 992 (1st Cir. 1990), cert. denied, 499 U.S. 912 (1991). Therefore, a student's IEP must be evaluated in the context of the student's needs, as well as the district's knowledge of those needs, at the time the IEP was developed.

Second, the "some benefit" standard articulated by the Supreme Court in Rowley[21] has been interpreted by the lower federal courts to mean that the IEP must confer more than a trivial educational benefit. Hall v. Vance County Bd. of Educ., 774 F.2d 629, 635 (4th Cir. 1985). Courts have consistently held that an IEP does not meet the substantive requirement of FAPE unless it confers a "*meaningful* educational benefit." M.A. v. Voorhees Township Bd. of Educ., 202 F.Supp.2d 345, 361 (D.N.J. 2002) (citing Polk v. Central Susquehanna Intermediate Unit 16, 853 F.2d 171, 181 (3rd Cir. 1988), cert. denied, 488 U.S. 1030 (1989)).

It is also important to note that IEPs do not have to articulate every minute detail of a child's program in order to be legally sufficient. The Tenth Circuit has observed that "there is no legal authority requiring a particular level of specificity in the statement of annual goals," and that "IEPs are not required to provide the level of detail found in monthly instructional plans." O'Toole v. Olathe Unified Sch. Dist. No. 233, 144 F.3d 692, 706 (10th Cir. 1998). In fact, the Fifth Circuit has ruled that an IEP meets the Rowley FAPE mandate as long as it meets a four-pronged test: "(1) the program is individualized on the basis of the student's assessment and performance; (2) the program is administered in the least restrictive environment; (3) the services are provided in a coordinated and collaborative manner by the key 'stakeholders;' and (4) positive academic and non-academic benefits are demonstrated." Houston Indep. Sch. Dist. v. Bobby R., 200 F.3d 341, 347-48 (5th Cir. 2000) (quoting Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 253 (5th Cir. 1997), cert. denied, 522 U.S. 1047 (1998)).

D. Is the Private Placement "Proper Under the Act?"

Under Burlington/Carter, parents seeking tuition reimbursement must do more than show that the District denied FAPE to their child. They must also show that the private placement they unilaterally selected was "proper under the Act." This second prong of the analysis becomes critical in cases involving students with drug and delinquency problems because the evidence often demonstrates that a residential program was pursued for reasons completely unconnected to education.

---

[21] Board of Educ. of Hendrick Hudson Central Sch. Dist. v. Rowley, 458 U.S. 176, 203-204 (1982).

1. Emotional Disturbance v. Conduct Disorder: A Split in the Circuits

Closely intertwined with the "child find" issue is the issue of whether a student has a disability that warrants residential placement. In many of the cases involving drug addicted students, parents allege that their children meet the criteria for "serious emotional disturbance," which are set forth in the IDEA's regulations, as follows:

> (i) The term [emotional disturbance] means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree that adversely affects a child's educational performance:
> (A) An inability to learn that cannot be explained by intellectual, sensory, or health factors.
> (B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers.
> (C) Inappropriate types of behavior or feelings under normal circumstances.
> (D) A general pervasive mood of unhappiness or depression.
> (E) A tendency to develop physical symptoms or fears associated with personal or school problems
> (ii) The term includes schizophrenia. The term does not apply to children who are socially maladjusted, unless it is determined that they have an emotional disturbance.[22]

Unfortunately, neither the IDEA nor its regulations provide an operational definition for the terms "adverse effect" or "social maladjustment." Therefore, it is not uncommon, particularly with children exhibiting "bad behavior," to have disagreement among parents and professionals, with the result often being litigation. As one author has noted: "If the disagreement can not be worked out through the IEP Team process, then courts are the final arbiters of whether the child receives special education and related services in the school setting. The clashes often arise when these two different sets of professionals [educators and mental health professionals], who use completely different sets of vocabularies, attempt to mesh their frameworks together to understand the child and his or her needs."[23]

Yet even the courts cannot agree on what these terms mean, and a significant split has developed among the circuits that is begging for resolution by the Supreme Court. On the one hand, the Fourth Circuit has adopted a narrow definition of ED, concluding that where students persist in unruly behavior outside societal norms, such as substance abuse and delinquency, they are most appropriately labeled "socially maladjusted" rather than ED. In Springer v. Fairfax County Sch. Bd., 134 F.3d 659, 664 (4th Cir. 1998), the court reasoned: "[A] 'bad conduct' definition of serious emotional disturbance might include almost as many people in special education as it excluded. Any definition that equated simple bad behavior with serious emotional disturbance would exponentially enlarge the burden IDEA places on state and local education authorities."

---

[22] 34 C.F.R. § 300.7(c)(4) (emphasis added).

Indeed, the weight of both court and administrative authority lines up with Springer, particularly where the student's difficulties occur primarily, or solely, outside of school. See, e.g., Katherine S. v. Umbach, No. CIV A. 00-T-982-E, 2002 WL 226697 (M.D. Ala. Feb. 1, 2002) (student in conflict with parents not ED); DeSoto County Sch. Dist., 102 LRP 3846 (SEA MISS.) (drug abusing student not ED); West Chester Area Sch. Dist., 32 IDELR 275 (SEA PA 2000) (drug abusing student not ED); Bonita Unified Sch. Dist., 32 IDELR 273 (student with severe behavior problems at home not ED); Capistrano Unified Sch. Dist., 31 IDELR 199 (marijuana-using student with diagnosis of depression not eligible for special education under OHI category); Hoffman v. East Troy Community Sch. Dist., 38 F.Supp.2d 750, 767 (E.D. Wis. 1999) (finding that student who was sleeping in class, fighting with his parents, and seeing a therapist for depression was not ED, and noting that the basic standard for ED is "commonsensical: an ED child's behavioral problems must be unusually serious as compared to the majority of his peers and must present a significant impediment to learning."); Davis County Sch. Dist., 102 LRP 4246 (SEA UT 1998) (student who was defiant with parents and abusing drugs and alcohol not ED); Williams Unified Sch. Dist., 26 IDELR 1198 (SEA CA 1997) (drug abusing student not ED); In Re T.L., 26 IDELR 1374 (SEA ILL. 1997)(drug and alcohol abusing student not ED); Mt. Diablo Unified Sch. Dist., 26 IDELR 338 (SEA CA 1997) (holding that student was not ED where student's school difficulties were caused by other factors, including substance abuse, lack of effort, and failure to attend class); Radnor Township Sch. Dist., 25 IDELR 1229 (SEA PA 1997) (student with long history of serious drug abuse, manipulative behaviors, theft, lying, and defiance with parents not ED); Board of Educ. of Midland Pub. Sch., 25 IDELR 669 (SEA MI 1996) (student who engaged in serious alcohol and drug use, got himself tattooed, pierced his ears and nose, mistreated his dog, threatened his sisters, extorted lunch money from younger students, engaged in group sex, and broke windows not ED); Pflugerville Indep. Sch. Dist., 21 IDELR 308 (SEA TX 1994) (student whose behavioral problems were attributable to his family life and drug abuse not ED); Fauquier County Pub. Sch., 20 IDELR 579 (SEA VA 1993) (student who exhibited behavioral problems outside of school not ED because her condition did not adversely affect her educational performance); Blickle v. St. Charles Community Unit Sch. Dist. No. 303, 20 IDELR 167 (N.D. Ill. 1993) ("A school cannot be held responsible for all psychiatric or other medical problems (including substance abuse), particularly when these problems manifest themselves beyond the parameters of a regular school day and do not directly bear on a child's instructional needs."); A.E. v. Indep. Sch. Dist. No. 25, 936 F.2d 472 (10th Cir. 1991) (holding that student

---

[23] Ellen A. Callegary, The IDEA's Promise Unfulfilled: A Second Look at Special Education & Related Services for Children with Mental Health Needs After Garrett F., 5 **J. Health Care L. & Pol'y** 164, 184 (2002).

engaging in theft, fighting, tardiness, smoking, use of improper language, and suicidal gestures was not ED, but rather socially maladjusted).

On the other hand, courts in the Fifth, Eighth, and Ninth Circuits have adopted broader definitions of "emotional disturbance," effectively blurring the lines between a student's behavior inside and outside of school. For example, in Indep. Sch. Dist. No. 284 v. A.C., 258 F.3d 769 (8th Cir. 2001), the Eighth Circuit noted that it believed it "unlikely that Congress meant for the IDEA to require states to provide a home away from home for students who simply make bad choices, even if those choices cause them to fail in school." Id. at 775. At the same time, the court reasoned that simply because most of the student's behavior problems, including drug abuse, sexual promiscuity, running away from home, and check forging, occurred outside of school, that did not mean residential placement was unnecessary. The court explained: "If the problem prevents a disabled child from receiving educational benefit, then it should not matter that the problem is not cognitive in nature or that it causes the child even more trouble outside the classroom than within it. What should control our decision is not whether the problem itself is 'educational' or 'non-educational," but whether it needs to be addressed in order for the child to learn." Id. at 777. See also Venus Indep. Sch. Dist. v. Daniel S., No. CIV. A. 301CV1746P, 2002 WL 550455 (N.D. Tex. 2002) (holding that student was OHI and ED because, even though student's academic performance was well above average, his behavioral problems, which resulted in over 20 suspensions, had an adverse effect on his overall educational performance; "a true measure of a child's educational performance is not strictly limited to an evaluation of his performance in academics."); County of San Diego v. California Special Educ. Hearing Office, 93 F.3d 1458, 1467 (9th Cir. 1996) (in determining whether a child's impairment has an adverse effect on educational performance, courts must consider that "educational benefit under the IDEA . . . is not limited to academic needs but includes social and emotional needs that affect academic progress, school behavior, and socialization."); Seattle Sch. Dist. No. 1 v. B.S., 82 F.3d 1493, 1500 (9th Cir. 1996) (explaining that the term "unique educational needs" shall be broadly construed to include the disabled child's academic, social, health, emotional, communicative, physical and vocational needs).

2. Private Placements for Reasons Separate and Apart from the Learning Process

Closely connected with the issue of eligibility is the issue of motive for the private placement. In the Fourth Circuit, the burden rests on the parents to show that the private placement they select is a proper placement "for their [child's] special educational needs." Tice v. Botetourt County Sch. Bd., 908 F.2d 1200, 1208 n.11 (4th Cir. 1990) (emphasis added). Further, the Fourth Circuit's position is that residential care is mandated only if it is "essential for the child to make *any* educational progress at all." Burke County Board of Educ. v. Denton, 895 F.2d 973, 980 (4th Cir. 1990). "If residential placement is necessitated by medical, social, or emotional problems that are segregable from learning process, then the local education agency need not fund the residential placement." Id. See also, Tennessee Dep't of Mental Health and Mental Retardation v. Paul B., 88 F.3d 1466, 1471 (6th Cir. 1996) (same).

Thus, numerous courts and hearing officers have denied reimbursement where the placement was made for reasons unrelated to education. For example, parents are not entitled to reimbursement where the child is placed in a residential setting for medical or psychiatric treatment. See, e.g., University of Iowa Hosp. & Clinics, 34 IDELR 169 (SEA IA 2001); Tredyffrin/Easttown Sch. Dist., 33 IDELR 254 (SEA PA 2000); Butler v. Evans, 225 F.3d 887 (7th Cir. 2000); Daugherty v. Hamilton County Sch., 21 F.Supp.2d 765 (E.D. Tenn. 1998); San Juan Unified Sch. Dist., 28 IDELR 47 (SEA CA 1997); Gladstone Sch. Dist. v. A.M., 25 IDELR 131 (9th Cir. 1996); Round Rock Indep. Sch. Dist., 25 IDELR 336 (SEA TX 1996); Clovis Unified Sch. Dist. v. California Office of Admin. Hearings, 903 F.2d 635 (9th Cir. 1990); McKenzie v. Jefferson, 566 F.Supp. 404 (D.D.C. 1983).

Likewise, parents have not been successful with reimbursement demands where they unilaterally placed their children in residential programs for treatment necessitated by family conflict, drug abuse, or delinquent behavior. See, e.g., Indian River County Sch. Bd., 36 IDELR 47 (SEA FLA. 2002) (student engaged in drug abuse and sexual promiscuity); Dale M. v. Board of Educ. of Bradley Bourbonnais High Sch. Dist. No. 307, 237 F.3d 813 (7th Cir. 2001) (student involved with drug abuse and juvenile delinquency); West Linn-Wilsonville Sch. Dist., 102 LRP 2443 (SEA OR. 2000) (student drug abuser who engaged in uncontrollable anger and destruction of objects at home); Armstrong v. Alicante Sch., 44 F.Supp.2d 1087 (E.D. Cal. 1999) (holding that drug prevention or intervention are not supportive services required by IDEA); Board of Educ. of Oak Park & River Forest High Sch. Dist. No. 200 v. Illinois State Bd. of Educ., 21 F.Supp.2d 862 (N.D. Ill. 1998) (student placed in psychiatric facility for "out-of-control" behavior, including running away, drug abuse, and defiance of home rules); Board of Educ. of Montgomery County v. Brett Y, 155 F.3d 557, 1998 WL 390553 (4th Cir. 1998) (student placed in a private program, the Grove School, for significant behavior problems at home); Pleasant Valley Community Sch. Dist., 28 IDELR 1295 (SEA IA 1998) (students' private psychotherapy prompted by home issues, including threats against her parents); Field v. Haddonfield Board of Educ., 769 F.Supp. 1313 (parents were responsible for the cost of student's enrollment in private drug treatment program); Brian M. v. Boston Pub. Sch., 401 IDELR 341 (SEA MA 1989) (ED student who abused drugs and alcohol).

E. **Equitable Considerations**

Finally, school officials should remember arguments of basic fairness in reimbursement cases. See Burlington, 471 U.S. at 374 ("equitable considerations are relevant in fashioning relief."). The IDEA regulations stipulate that reimbursement may be denied upon "a judicial finding of unreasonableness with respect to actions taken by the parents,"[24] and hearing officers and courts "look harshly upon any party's failure to reasonably cooperate with another's diligent execution of their rights and obligations under the IDEA." Particia P. v. Board of Educ. of Oak Park, 203 F.3d 462, 469 (7th Cir. 2000). See also W.G. v. Board of Trustees of Target Range Sch. Dist. No. 23, 960 F.2d 1479, 1485 (9th Cir. 1992) ("The conduct of both parties must be reviewed to determine whether relief is appropriate.").

Thus, schools can defeat reimbursement claims if parents have, among other things, negotiated in bad faith, concealed information, or refused to make their child available to school officials for evaluation. See, e.g., Montgomery County Pub. Sch., 31 IDELR 223 (SEA MD 2000) (parents continually delayed proposed meeting times and refused to submit information; parents "appeared more interested in the district as a funding source rather than as an educational source."); Glendale Unified Sch. Dist. v. Almasi, 122 F.Supp.2d 1093 (C.D. Cal. 2000) (reducing reimbursement award where parent withheld information from school officials which impaired their ability to make decisions about the child's program); L.K. v. Board of Educ. for Transylvania County, 113 F.Supp.2d 856 (W.D.N.C. 2000) (denying reimbursement where parent unilaterally withdrew child without providing district opportunity to evaluate his needs); Schoenfeld v. Parkway Sch. Dist., 138 F.3d 379 (8th Cir. 1998) (denying reimbursement where parents enrolled child in private school without conferring with school officials or providing them with opportunity to evaluate and formulate a plan); Montgomery County Pub. Sch., 24 IDELR 400 (SEA MD 1996) (parents denied reimbursement for refusal to cooperate with the district in evaluating the child); New York City Bd. of Educ., EHLR 508:119 (SEA NY 1986) (parents failed to cooperate in good faith with the district by refusing to make information available and refusing to attend IEP meeting).

IV. Recommendations

Ideally, with the next reauthorization of IDEA, Congress will rewrite some of the provisions on unilateral placements to make some of these issues less controversial. For example, Congress should provide a more narrow definition of ED, with an accompanying definition of "social maladjustment." In addition, given school districts' tight budgets and the failure of Congress to provide full funding of the IDEA, Congress should revise the parental notice provisions so that a failure to comply would result in an automatic denial of reimbursement.

In the meantime, school officials can still reduce their potential exposure for tuition reimbursement claims by taking a number of steps, including:

1. Ensure that all parents and staff are aware of the 10-day prior notice requirement. Notwithstanding the notice requirement, parents can still recover if they did not receive notice of the notice requirement. 34 C.F.R. § 300.403(e)(4).

---

[24] 34 C.F.R. § 300.403(d)(3).

2. Upon learning that parents are withdrawing their child and pursuing a private residential program, insist on full disclosure of all information and request parents' consent for further evaluation, particularly if there is any concern at all that behavioral/emotional/medical problems outside of school have adversely affected the child's behavior or academic performance at school. Schools have the right, under the IDEA, to evaluate students with their own personnel, even in the face of allegations that further evaluations might result in medical or psychological harm to the student. Andress v. Cleveland Indep. Sch. Dist., 64 F.3d 176 (5th Cir. 1995).

3. Bend over backward to demonstrate good faith and a willingness to work with the parents toward a return of the student to public school. This approach should include, for students who still have more than one year of school left after withdrawal, inviting the parents to an IEP meeting to develop a new IEP for the ensuing school year, although it is not clear whether school officials are legally obligated to do so.[25] Compare Carl D. v. Special Sch. Dist. of St. Louis County, 21 F.Supp.2d 1042 (E.D. Mo. 1998); and Amann v. Stow Sch. Sys., 982 F.2d 644 (1st Cir. 1992); and Questions and Answers on Obligations of Public Agencies in Serving Children with Disabilities Placed by Their Parents at Private Schools, OSEP Memorandum 00-14 (OSEP May 4, 2000) (all holding that the IDEA does not impose a continuing duty upon school districts to develop and implement IEPs for students unilaterally placed in private school by their parents) with Redding Elementary Sch. Dist. v. Goyne, 34 IDELR 118 (E.D. Cal. 2001); and Justin G. v. Board of Educ. of Montgomery County, 148 F.Supp.2d 576 (D. Md. 2001); and Knable v. Bexley City Sch. Dist., 238 F.3d 755 (6th Cir. 2001); Upland Unified Sch. Dist., 102 LRP 7623 (SEA CA 2000); and Doolittle v. Meridian Joint Sch. Dist. No. 2, 24 IDELR 357 (Idaho 1996) (all holding that school officials have an ongoing duty to annually update a student's IEP and to provide FAPE once they are on notice that a student has been unilaterally placed by his parents in a private school).

4. Carefully scrutinize the program and services delivered to the child in the private placement. Many of the residential treatment programs in which drug abusing students enroll are nothing more than behavior modification programs, which are inappropriate under the Act for a number of reasons, including the fact that they may not deliver any educational services, much less an individualized program,

---

[25] The regulations state only that each public agency must ensure that "an IEP is developed and implemented for each eligible child placed in or referred to a private school or facility by the public agency." 34 C.F.R. § 300.341(a)(2) (emphasis added).

and may, because of their restrictive nature, violate the IDEA"s least restrictive environment (LRE) mandate.

5. Remember that drug addiction itself is not a disabling condition under the IDEA, and therefore, if psychiatric treatment is required solely to treat the child's addiction, and is not required to provide FAPE, the school is not required to provide the treatment or to provide it at no cost. Letter to Woodson, 213 IDELR 224 (OSEP 1989). Significantly, the IDEA "is not a panacea for all of life's ills,"[26] and school officials cannot be held responsible under the Act for failing to remedy "adolescence."[27]

---

[26] Maricus W. v. Lanett City Bd. of Educ., 141 F.Supp.2d 1064, 1069 (M.D. Ala. 2001).

[27] Socorro Indep. Sch. Dist. v. Angelic Y, 107 F.Supp.2d 761, 767 n.8 (W.D. Tex. 2000).

EDUCATION FINANCE LITIGATION: AN EXAMINATION OF EMERGING TRENDS AND FUTURE DIRECTIONS

R. Craig Wood
B.O. Smith Research Professor
University of Florida

and

John Dayton
Professor of Education Law
University of Georgia

Education finance litigation sparked by *Serrano* continues unabated throughout the United States. Over three decades have passed since the Supreme Court of California's landmark decision in *Serrano v. Priest*[1] resulted in victory for funding equity plaintiffs, and established a model for similar litigation in other states.[2] Since *Serrano*, one of the more significant developments in the evolution of funding litigation has been the emerging focus on constitutional adequacy in the provision of public education.[3] This study is based on a review of relevant published opinions and scholarly commentary since *Serrano*, and discusses the efficacy of funding litigation, the continuing evolution of funding litigation, shifting balances of state and local control, and the potential future of funding litigation.

THE EFFICACY OF FUNDING LITIGATION

A review of three decades of funding litigation inevitably raises the question: Has this litigation been effective? In answering this question, assessments of the efficacy of funding litigation largely depend on expectations. Those that expected funding litigation to be the panacea for all public school equity problems were inevitably disappointed. But by any measure, funding litigation since *Serrano* has been extensive and enduring, affecting every state to some degree in the three decades since *Serrano*. The persistence and pervasiveness of this litigation suggests that plaintiffs must believe they have been achieving some of their goals. Funding litigation efforts do appear to have been successful in getting funding equity concerns into the public forum and on the legislative agenda. Nonetheless, after many years of litigation and judicial intervention, substantial funding inequities continue. Judicial declarations that funding systems were unconstitutional have prompted legislative reform efforts in many states. But even where reforms have been enacted there has often been a tendency towards deterioration of equity gains.[4] Through the disproportionate influence often available to those with economic and political power, politically powerful districts may continue to dominate the legislative process, sometimes altering equity reform legislation to the degree that inequities may actually increase after initial reform efforts.[5] A review of the case law and scholarly commentary since *Serrano* indicates that while the efficacy of funding litigation varied dramatically among states, no where did plaintiffs fully achieve their equity goals. But in all states, funding equity issues were likely afforded greater consideration because of litigation concerns,[6] leading some scholars to conclude that a credible threat of litigation may be more effective in achieving reform than actual litigation.[7] Whether funding litigation is an effective means of promoting funding reform remains an issue of intense debate among litigants and scholars.

THE CONTINUING EVOLUTION OF FUNDING LITIGATION

Despite the debate concerning the efficacy of funding litigation, this litigation continues unabated, and continues to evolve. For example, earlier *Serrano*-type cases largely focused on disparities in per-pupil expenditures. But in contrast to earlier *Serrano*-type cases, many more recent judicial opinions have focused on the provision of an adequate education.[8] The goal appears to be assuring access to the educational resources necessary to provide an adequate education for every child regardless of per-pupil expenditures, while permitting local discretion to exceed the minimums of educational adequacy.

But adequacy cases lack the clear judicially manageable standard of fiscal equity in *Serrano*, leading judges into the murky waters of defining an "adequate" education. In the broad spectrum between extreme judicial activism and extreme judicial deference, there are at least three possible judicial approaches to ordering legislative reform to achieve adequacy: substantive standards, procedural standards, and broad judicial deference to the legislature.

Some courts have issued judicial opinions expressly outlining substantive minimally standards for an adequate education under their state's constitution.[9] For example, in *Rose v. Council for Better Education*, the Supreme Court of Kentucky declared that the Kentucky Constitution required as a minimum that each student's educational program must provide:

> 1) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization;
> 2) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices;
> 3) sufficient understanding of governmental processes to enable the student to understand the issues that affect his of her community, state, and nation;
> 4) sufficient self-knowledge and knowledge of his or her mental and physical wellness;
> 5) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage;
> 6) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and
> 7) sufficient levels of academic or vocational skills to enable public school students to compete favorably with their counterparts in surrounding states, in academics or in the job market.[10]

By explicitly outlining minimal constitutional requirements for an adequate education, courts are establishing substantive standards that could help to guide legislators in enacting reforms to assure that every student receives the educational resources required by the state constitution, but still allow for local supplements that exceed minimal constitutional adequacy. However, judicial opinions establishing educational standards raise serious questions concerning judicial competence, authority, and separation of powers.

Other courts have declined to issue explicit substantive standards, but instead appeared to require a procedural process in which the general assembly must: 1) consider what constitutes an adequate education under their constitution; and 2) design a funding system to assure that resources are available to fund this adequate education for all children. For example, in *Cambell County v. State* the Supreme Court of Wyoming declared the state funding system unconstitutional, and ordered a remedy stating that "the legislature must first design the best educational system by identifying the 'proper' educational package each Wyoming student is entitled to have" and second the "cost of that educational package must then be determined and the legislature must then take the necessary action to fund that package."[11]

Courts concerned about judicial competence, authority, and separation of powers issues could also merely declare funding systems unconstitutional, broadly defer to legislative authority in defining a constitutionally adequate education, and provide no explicit guidance concerning what legislators must do to produce a funding system that would survive future judicial scrutiny. However, it can be argued that this judicial ambiguity in mandating reform, and the resulting legislative trial-and-error process, could contribute to protracted litigation as the general assembly must "guess" at what the court considers a constitutionally adequate response to the court's decision.

Heated debate continues concerning the proper limits of judicial authority in setting standards for an adequate education, and judges' views about judicial competence, authority, and separation of powers are good indicators of whether they would support or oppose an activist role for the court in future funding litigation. The doctrine of separation of powers clearly prohibits judges from exercising legislative or administration powers. Further, most judges have no special expertise in education, and were not elected by the people to make educational policy. Debate continues concerning whether judicial declarations expressly outlining an adequate education exceed judicial authority, or whether failure to clearly set clear judicial standards in ordering a remedy constitutes judicial negligence.

SHIFTING BALANCES OF STATE AND LOCAL CONTROL

Even casual observers of educational policy have likely observed that state level control is increasingly dominating public education. From increased state accountability efforts and curriculum mandates to new finance programs, states are asserting growing authority over local schools.[12] However, it is interesting to note that in *San Antonio v. Rodriguez,*[13] and in many subsequent state court opinions upholding challenged funding systems, funding disparities were justified based on the state's asserted goal of promoting local control. As state level funding and control increase, at the expense of local control, it becomes increasingly difficult to justify continued funding inequities based on preserving local control.

In addition, increases in federal mandates and funding may further erode local control. The *No Child Left Behind Act of 2001* brings both new federal mandates and money to local schools. While local school officials will certainly welcome more state and federal dollars, funding and control are indissolubly linked. If "local control" was a legitimate justification for perpetuating funding inequities, with every additional state and federal dollar and mandate, the local control justification is further weakened.

THE FUTURE OF FUNDING LITIGATION

Any discussion about the future is necessarily speculative, but a review of recent funding litigation, political activity, and scholarly commentary reveals some developing trends concerning the potential future of funding litigation. This section briefly reviews selected issues likely to influence the future of funding litigation, including, equity, adequacy, accountability, economic status, politics, and the special problems of rural and urban schools.

From Equity, to Adequacy, to Accountability?

Law and finance scholars have documented the judicial trend from equity to adequacy in funding litigation, but a recent decision by the Supreme Court of New Hampshire in *Claremont v. Governor (Claremont III)*[14] appears to take a new approach by focusing directly on accountability as a constitutional requirement of an adequate education. In *Claremont I*, the Supreme Court of New Hampshire held that the state constitution "imposes a duty on the State to provide a constitutionally adequate education to every educable child in the public schools in New Hampshire and to guarantee adequate funding."[15] In *Claremont II* the court held that a state funded constitutionally adequate education was a fundamental right, any property tax levied to fund education is a state tax and the taxing district is the entire state, and disproportionate local school taxes were an unreasonable and unconstitutional means of funding schools.[16] In *Claremont v. Governor III*, the Supreme Court of New Hampshire was asked to determine whether: 1) the State's obligation to provide a constitutionally adequate education required the State to provide standards of accountability; and 2) to what extent statutory exemptions for financial hardship excused compliance with minimum educational standards established by the State.[17] In a 3-2 decision the court held that "accountability is an essential component of the State's duty and that the existing statutory scheme has deficiencies that are inconsistent with the State's duty to provide a constitutionally adequate education."[18]

In *Claremont III* the State characterized the court's prior holdings as requiring the State to: 1) define an adequate education; 2) calculate the costs; 3) provide funding with constitutional taxes; and 4) ensure the delivery of an adequate education through adequate accountability measures.[19] The court noted that the Senate had passed a bill described as "an Act establishing a comprehensive statewide accountability system concerning an adequate education."[20] The court further noted that: "In this legislation, specific test scores were established as performance goals that students had to meet. The State, however, was not required to assist schools or school districts where students did not meet these goals."[21] The Senate Bill was vetoed by the Governor, because the legislation contained no provisions to require accountability, with the Governor quoting President George W. Bush's statement that "without consequences for failure, there is no pressure to succeed."[22]

Concerning accountability, the court stated that:

> Accountability is more than merely creating a system to deliver an adequate education. *Claremont I* did not simply hold that the State should deliver a constitutionally adequate education, but in fact held that it is the State's duty under the New Hampshire Constitution to do so . . . Accountability means that the State must provide a definition of a constitutionally adequate education, the definition must have standards, and the standards must be subject to meaningful application so that it is possible to determine whether, in delegating its obligation to provide a constitutionally adequate education, the State has fulfilled its duty . . . This view is shared by other jurisdictions. In Massachusetts, for example, in response to *McDuffy* . . . the legislature promulgated a system of accountability whereby the state board of education was given authority to establish specific performance standards and a program of remediation when students' test scores fall below a certain level . . . In Ohio [*DeRolph*] the state supreme court stated that "accountability is an important component of the educational system" . . . In Tennessee [*McWhether*] the state supreme court said that "the essentials of the governance provisions of the [Basic Education Program] are mandatory performance standards; local management within established principles; performance audits that objectively measure results; . . . and final responsibility upon the State officials for an effective educational system throughout the State" . . . It is thus widely accepted that establishing standards of accountability is part of the State's duty to provide a constitutionally adequate education.[23]

The court stated that: "The system the State currently has in place appears to use both standards based on what school districts provide (input-based standards) and results that school districts achieve (output-based standards)."[24] But the court noted that: "The plaintiffs argue that despite these programs, 'the State has failed to meet its obligation to promulgate standards because the standards in place are voluntary, unconstitutional, and do not set any specific levels of performance that schools or school districts must meet.'"[25] The State responded that it "dictates certain school approval standards that schools and school districts must meet" and that the education individual schools provide is measured against these standards for approval.[26]

But the court noted that the applicable statute provides that: "The state board of education shall have the power to approve for a reasonable period of time a high school that does not fully meet the requirements . . . if in its judgment the financial condition of the school district or other circumstances warrant delay in full compliance."[27] The court further noted that the administrative regulations define a financial or emergency condition that could justify excusal from compliance to include: "1) Reduction in local tax base; 2) Closing of a major industry; 3) Sudden influx of school-age population; 4) Emergency beyond the control of the school district, such as fire or natural disaster; or 5) Other financial or emergency condition not listed above." The court stated that:

> On their face [the statute and regulation] permit a school district to provide less than an adequate education as measured by these minimum standards when the local tax base cannot supply sufficient funds to meet the standards. The statue and the rule also permit noncompliance with the standards under emergency conditions, such as a fire or natural disaster. While it may be permissible to excuse noncompliance under emergency conditions, the statute permits the board of education to also approve a school that does not meet the minimum standards based solely on the "financial condition of the school district" . . . Excused noncompliance with the minimum standards for financial reasons alone directly conflicts with the constitutional command that the State must guarantee sufficient funding to ensure that school districts can provide a constitutionally adequate education. As we have repeatedly held, it is the State's duty to guarantee the funding necessary to provide a constitutionally adequate education to every educable child in the public schools in the State . . . The responsibility for ensuring the provision of an adequate public education and an adequate level of resources for all students in New Hampshire lies with the State. While local governments may be required, in part, to support public schools, it is the responsibility of the State to take such steps as may be required in each instance effectively to devise a plan and sources of funds sufficient to meet the constitutional mandate . . . There is no accountability when the rules on their face tolerate noncompliance with the duty to provide a constitutionally adequate education. While the State may delegate this duty . . . it must do so in a manner that does not abdicate the constitutional duty it owes to the people . . . The State's duty cannot be relieved by the constraints of a school district's tax base or other financial condition . . . the State may not take the position that the minimum standards form an essential component of the delivery of a constitutionally adequate education and yet allow for the financial constraints of a school or school district to excuse compliance with those very standards. We hold, therefore, that to the extent the minimum standards for school approval excuse compliance solely based on financial conditions, it is facially insufficient because it is in clear conflict with the State's duty to provide a constitutionally adequate education.[28]

Although the applicable statute provides for state-wide assessments, the court noted that under the statute "no school district is required to respond to the assessment results; rather 'each school district in New Hampshire is *encouraged* to develop a local education improvement and assessment plan' . . . neither the school district nor the department of education is required to do anything . . . The department of education is available to assist. Nothing more is required."[29] The court stated that:

"The purpose of meaningful accountability is to ensure that those entrusted with the duty of delivering a constitutionally adequate education are fulfilling that duty . . . The State has not provided a sufficient mechanism to require that school districts actually achieve this goal."[30] The court concluded that: "We hold that because of deficiencies in the system as set out in this opinion, the State has not met its constitutional obligation to develop a system to ensure the delivery of a constitutionally adequate education."[31]

Based on the court's decision in *Claremont III*, it is possible that state accountability measures could receive greater scrutiny in future opinions concerning whether the state is meeting constitutional obligations to provide an adequate education.

The Effects of Budget Deficits on Funding Reform Efforts

Several courts have held that state fiscal difficulties do not excuse failure to comply with constitutional mandates to support education. In declaring the entire public education system of Kentucky unconstitutional and requiring a complete revision, the Supreme Court of Kentucky stated: "The taxpayers of this state must pay for the system, no matter how large, even to the point of being unexpectedly large or even onerous."[32] The Supreme Court of Texas held that "the legislature must establish priorities according to constitutional mandates; equalizing educational opportunity cannot be relegated to an 'if funds are left over' basis."[33] The Supreme Court of Montana concurred, stating that "fiscal difficulties in no way justify perpetuating inequities."[34] While no court has stated they would allow state fiscal difficulties to effect their decision, La Morte and Williams suggested that:

> [E]conomic recessions, can act to thwart plaintiffs' hopes since the unavailability of revenue makes change more difficult and bolsters defendants' contention that workable solutions do not exist. When the fiscal condition of state governments is relatively healthy, equity may well enjoy popularity: state revenue is available for a "leveling up" process, which is clearly a more palatable task for both courts and legislatures than requiring a "leveling down." Speculation is difficult, however, as to whether economic conditions would lead to different judicial treatment of the issues presented.[35]

It may be impossible to definitively establish that economic conditions affect judicial decisions on funding cases, although common sense and anecdotal evidence may support this theory, as it is certain that the availability of funds will affect the legislative response to judicial reform mandates.[36] And if the prospects for an acceptable legislative response are remote, judges may be hesitant to order reform when the environment for remedial efforts appears inhospitable, fearing judicial entanglement in protracted and unproductive serial litigation or legislative defiance that may call into question the power and authority of the court. Obviously, it would be difficult or impossible to fund extremely expensive school funding reform in a time of dramatic budget deficits and budget cuts. Although judges have a duty to be guided by the law and not current economic or political conditions, most state judges are also elected officials, and likely very aware of current economic and political realities in their state.

Urban School Funding Litigation

Urban schools continue to face considerable challenges, some of which were the subjects of prior desegregation efforts. But as urban school districts are increasingly declared unitary, formal judicial desegregation efforts are ending (Dayton, 1993). However, it should be remembered that *Serrano v. Priest* (1971) was the ideological descendent of *Brown v. Board of Education* (1954), and with the termination of *Brown*-era reform efforts, some urban school advocates are attempting to resurrect *Brown*-type reform efforts by employing *Serrano*-type litigation. They are asserting that state funding schemes disparately impact members of racial minorities, particularly in urban areas. To date, this line of litigation has achieved very limited success in the courtroom. Recently, in *Campaign for Fiscal Equity v. State*, the New York Supreme Court, Appellate Division, reversed a trial court decision in favor of plaintiffs, holding that plaintiff students were already receiving an opportunity for a sound basic education as required by the New York Constitution, and that the law and facts did not support a Title VI claim of discrimination.[37]

Some of the legal theories employed to support funding reform for urban schools have included claims based on desegregation orders, the equal protection clauses of both the federal and state constitutions, state education articles, state anti-discrimination laws, and Title VI of the Civil Rights Act of 1964. As noted above, formal desegregation orders are ending. Further, because many urban schools already receive higher funding levels than other schools in the state, equal protection claims are problematic. As the Supreme Court of North Carolina noted in *Leandro v. State*, when urban schools intervened in a funding equity case: "Ironically, if plaintiff-intervenors' [large relatively wealthy urban districts] argument should prevail, they would be entitled to an unequally large per-pupil allocation of state school funds for their relatively wealthy urban districts."38 Claims based on discrimination have been limited based on lack of evidence of intent to discriminate, and judicial decisions holding that disparate impact alone does not constitute actionable discrimination.[39] Urban school litigation was further limited by the U.S. Supreme Court's decision in *Alexander v. Sandoval*, holding that there is no private right of action under the implementing regulations of Title VI.[40] These developments have cast doubt on the continued viability of race-based funding equity litigation for urban schools. However, advocates for these schools have demonstrated considerable creativity in litigation. Further, even if these arguments are unsuccessful in the courts, these arguments could still carry considerable weight in the political arena.

Rural School Funding Litigation

There appears to be evidence of continued and even growing disparities in resources for some rural and metropolitan area schools, and an escalating battle over financial resources between rural and metropolitan districts. If the fiscal situation of rural schools in some states continues to deteriorate, and if state lawmakers fail to provide adequate remedies, litigation may be the only remaining option for disadvantaged rural schools. Among the issues aggravating disparities among rural and metropolitan area schools are some states increased reliance on sales taxes to supplement funds for public education. Clearly, legislators and local officials face a formidable task in adequately funding public schools. And in their search for new sources of revenue, some state officials are increasingly turning to local sales taxes to supplement local schools. But funding systems using local sales taxes pose a growing threat to equitable funding for rural schools as centers of commerce increasingly move from smaller communities to larger metropolitan areas. As the Supreme Court of Tennessee recognized in *Tennessee Small School Systems v. McWherter*, the use of local sales taxes to fund local schools significantly disadvantages rural school districts.[41] The Supreme Court of Alabama also noted in *Opinion of the Justices* that "rural students are disadvantaged because they generally live in areas without large shopping centers and are thus unable to generate substantial sales tax revenues for support of their schools."[42]

Nonetheless, because of the difficulty of acquiring additional funds for public schools in a political environment already aggravated by high taxes, funding schemes utilizing local sales taxes continue to attract supporters. Many property owners have been persuaded that local sales taxes provide a means of limiting property taxes by imposing part of the burden of funding local schools on out-of-district shoppers and persons who do not own property. But rural community advocates argue that this use of sales taxes not only increases funding disparities between metropolitan and rural schools, but also imposes a regressive tax on poorer individuals. Further, it drains additional funds from poorer rural communities into metropolitan areas as rural residents must increasingly travel to metropolitan areas to shop for goods and services not available locally. Increased litigation by rural funding advocates is possible based on funding disparities related to increased reliance on local sales taxes, inadequate facilities, and inadequate funding for other educational resources in rural schools.

The Politics of Funding Litigation

Because the status quo is in most states a reflection of political realities, significant changes in funding in some states may be slow, difficult, or impossible under current circumstances. In many states funding inequities persist largely because the political interests that created fiscal realities also persist. For good or bad, the status quo is a reflection of current political realities in many states. Significant and lasting changes in funding reform may only occur when accompanied by significant and lasting changes in political realities.

Nearly three decades after *Serrano*, equity reformers remain active. Further, equity reformers have been successful in about 50% of the cases. However, these post-*Serrano* judicial mandates for funding reform have created a political dilemma for legislators. Presumably, because funding legislation is a product of the political process, funding systems are largely consistent with current political realities, making meaningful reform politically difficult. But if legislators do nothing, they face compliance litigation from plaintiffs and possible contempt sanctions from the courts. And if legislators alter the political status quo and redistribute funding, they may likely face political backlash and possible counter-litigation from

BEST COPY AVAILABLE

those advantaged by the prior system of funding. Further, anytime the funding formula is changed, the door is opened for both former plaintiffs and other aggrieved parties to relitigate based on changed circumstances.

After 30 years of post-*Serrano* litigation, funding inequities persist, causing many to question the efficacy of this litigation. The continued flurry of litigation since *Serrano* may seem to some excessive or even futile. However, others would argue that this protracted debate over funding equity, including litigation, is a necessary element in the continuing efforts to achieve a just and workable balance among competing interests in the contentious arena of public school finance.

CONCLUSION

An examination of current and potential litigation in the 50 states indicates that the litigation spawned by *Serrano* continues to thrive and evolve. Plaintiffs appear to be placing a greater emphasis on tangible evidence of disparities in educational resources, and less emphasis on per-pupil expenditures. And judges appear to be focusing more on defining the parameters of a minimally adequate public education under their state's constitution than on mere per-pupil funding disparities. Tension also appears to be building among rural schools, hindered by relatively low property values, higher costs of rural education, and an inability to benefit from the local sales taxes available to many metropolitan area schools. Further, as desegregation orders lapse nation-wide, some urban schools may employ funding litigation to help remedy continuing urban school inequities and inadequacies. A review of recent and pending funding litigation and reform efforts indicates that the spirit of *Serrano* is alive and well throughout the 50 states, and shows no indications of subsiding.

---

1. 487 P.2d 1241 (Cal. 1971). *See also* Note, *The Serrano Documents*, 2 Yale Rev. L. & Soc. Action 77 (1971).

2. Most scholars recognize *Serrano* as the beginning of the modern era in funding litigation. *See* Michael W. La Morte, School Law 358 (4th. ed. 1993) ("*Serrano* . . . provided the court with a judicially manageable standard, which had been missing in *McInnis* and *Burruss*") McInnis v. Shapiro, 293 F. Supp. 327 (1968), *affirmed sub nom. McInnis v. Ogilvie*, 394 U.S. 322 (1969); Burruss v. Wilkerson, 310 F. Supp. 572 (1969), *Affirmed* 397 U.S. 44 (1970); *see also* William E. Sparkman, *School Finance Challenges in State Courts, in* The Impacts of Litigation and Legislation on Public School Finance 193, 197 (Julie K. Underwood ed., 1990) ("the claims made by the plaintiffs in the California school finance case *Serrano v. Priest* are representative of similar claims made in over 30 other states since the late 1960s").

3. *See* Paul A. Minorini & Stephen D. Sugarman, *Educational Adequacy and the Courts: The Promise and Problems of Moving to a New Paradigm, in* Equity and Adequacy in Education Finance: Issues and Perspectives (Helen F. Ladd, Rosemary Chalk, & Janet S. Hansen eds. 1999).

4. William E. Camp & David C. Thompson, *School Finance Litigation: Legal Issues and Politics of Reform*, 14 J. Educ. Fin. 221, 223-224 (1988).

5. T. Bevelock, *Public school financing reform: Renewed interest in the courthouse, but will the statehouse follow suit?*, 65 St. John's Law Review 467, 489 (1991).

6. David C. Thompson, R. Craig Wood, & David S. Honeyman, Fiscal Leadership for Schools 290 (1994) (''if it were not for litigation, it is absolutely certain that less progress toward fundamental fairness in school finance would exist today'').

7. John Dayton. *Examining the Efficacy of Judicial Involvement in Public School Funding Reform*, 22 J. Educ. Fin. 1 (1996).

8. *See*, James W. Guthrie & Richard Rothstein, *Enabling "Adequacy" to Achieve Reality: Translating Adequacy into State School Finance Distribution Arrangements, in* Equity and Adequacy in Education Finance: Issues and Perspectives (Helen F. Ladd, Rosemary Chalk, & Janet S. Hansen eds. 1999).

9. *See* Pauley v. Kelly, 255 S.E.2d 859 (W. Va. 1979) (In defining a thorough and efficient education, the court included in its "legally recognized elements of this definition" the development of every child's capacity related to: 1) literacy; 2) mathematics; 3) government; 4) environmental and self-knowledge; 5) academic and work-training; 6) recreation; 7) creative arts; and 8) socialization skills).

10. 790 S.W.2d 186, 212 (Ky. 1989).

10. 907 P.2d 1238, 1279 (Wyo. 1995).

12. Neil Theobald. *State Activism in School Funding*, 66 School Business Affairs 44 (2000).

BEST COPY AVAILABLE

---

13. 411 U.S. 1 (1973).

14. 794 A.2d 744 (N.H. 2002).

15. 635 A.2d 1375, 1376 (N.H. 1993).

16. 703 A.2d 1353 (N.H. 1997).

17. 794 A.2d 744 (N.H. 2002).

18. *Id.* at 745.

19. 794 A.2d 744, 749 (N.H. 2002).

20. *Id.*

21. *Id.*

22. *Id.* at 750.

23. *Id.* at 751-752.

24. *Id.* at 753.

25. *Id.*

26. *Id.*

27. *Id.* at 754.

28. *Id.* at 744-755.

29. *Id.* at 757-758.

30. *Id.* at 758.

31. *Id.*

32. Rose v. Council for Better Education., 790 S.W.2d 186, 208 (Ky. 1989).

33. Edgewood v. Kirby, 777 S.W.2d 391, 397-398 (Tex. 1989).

34. Helena v. State, 769 P.2d 684, 690 (Mont. 1989).

35. Michael W. La Morte & Jeffrey D. Williams, *Court Decisions and School Finance Reform*, 21 EDUC. ADMIN. Q. 59, 81 (1985).

---

36. Many states' constitutions require the legislature to operate under a balanced budget. Law makers cannot spend funds the state is not legally authorized to spend, even for the most noble of purposes.

36. 744 N.Y.S.2d 130 (N.Y. App. Div. 2002).

38. 488 S.E.2d 249, 257 (N.C. 1997).

38. Campaign for Fiscal Equity v. State, 744 N.Y.S.2d 130 (N.Y. App. Div. 2002).

39. 532 U.S. 275 (2001).

40. 851 S.W.2d 139, 144 (Tenn. 1993).

41. 624 So.2d 107,124 (Ala. 1993).

EDUCATION CLAUSES, STATE CONTEXTS, AND FINANCE CASE OUTCOMES:

TOWARDS A HOLISTIC CONSTITUTIONAL INTERPRETATION

Karen DeMoss
University of New Mexico

A paper presented at the 48th Annual Conference of the
Education Law Association
New Orleans, November 14-16, 2002.

Introduction

The provision of education in the United States has a long, inequitable history, replete with both unintentional and overt racial discrimination, economic self-interest, and political laissez faire. In 1954, *Brown v. Board of Education* established in the national consciousness the fiscal and racial underpinnings of unequal educational opportunity that have characterized American schooling; in many ways, little has changed since then. Racially isolated, under-funded schools remain common (Jenks & Peterson, 1991; Kozol, 1991; McDermott, 1999; Orfield & Ashkinaze, 1991; Wilson, 1987). Even when race is not an issue, economic self-interest couples with disparity between property-rich and property-poor school districts to create a cycle of inequitable educational provision (McDermott, 1999).

As a result, poorer children often attend schools with more students per class, less qualified teachers, and fewer programs—all of which correlate with lower outcomes. In fact, evidence continues to mount demonstrating that money matters in children's educational provision (Grissmer, Flanagan, Kawata, & Williamson, 2000; Grissmer, Flanagan, & Williamson, 1997; Hedges, Laine, & Greenwald, 1994; Wenglinsky, 1997). Nevertheless, countless schools cannot provide adequate educational opportunities, for a variety of reasons. The wealthy generally do not want their taxes redistributed to poor districts, creating a tension between economic self-interest and the broader state and national interests of having an educated populace. In states whose gross product and personal income is limited, revenues within the state simply cannot provide the kind of education many children need. Equal educational opportunity faces race, class, and budgetary obstacles, a fact that has made legislatures loath to propose drastic changes to educational provision except when under court order (Kozol, 1991; Ringquist & Garand, 1999; Rothstein, 2000; Wood & Thompson, 1996).

The complex issues and interests involved in education finance have resulted in three decades of litigation in states across the country, but despite strikingly similar claims in the suits, state supreme court outcomes are highly unpredictable (Lundberg, 2000; Sparkman, 1990; Swenson, 2000; Wood & Thompson, 1996). Whether assessed from the point of view of the litigation approach plaintiffs use (Thro, 1994; Underwood & Vergstegen, 1990; Vergstegen & Whitney, 1997a) or accounting for the strength of states' constitutional mandates for educational provision (Lundberg, 2000; Ratner, 1985; Swenson, 2000; Thro, 1993), patterns of outcomes are only weakly associated with the factors that traditional legal interpretation would have us examine. In the end, results seem inexplicable, with some states simply choosing to uphold their finance systems, others electing to overturn them. This research examines more closely the role that states' constitutional mandates have played in these varying outcomes, seeking to understand why, in a country where one of the few constitutionally shared responsibilities of the fifty states is the provision of education, court outcomes vary so drastically, even controlling for constitutional mandates. In particular, the work focuses on two guiding questions:

- In cases where justices seem to have ruled contrary to the state education clauses, what kinds of interpretive rationales have they provided?
- In what ways might other constitutional considerations—such as narrowly or broadly framed preambles, governmental responsibility parameters, or equal protection clauses—have influenced outcomes, both rulings in line with education clauses and those seemingly contrary to those clauses?

Methods and Data

Answering questions about states' varied education finance rulings requires assessing the contexts within which state cases have been tried. High tax capacities could enable states that are otherwise conservative to provide equitable funding. Conversely, liberal citizen and government values could encourage states with low capacities to tax at high rates to provide more funding. Racial divides persistent in geographic boundaries could deter legislatures from allocating resources away from the suburbs into areas of need, and urban and rural areas could muster differential legislative clout, tipping the balance for one or the other in a funding formula. Other measures pertinent to education also vary widely between states. Education in Utah, with an average of two people per square mile, demands different considerations than in New Jersey, with 1000 people per square mile (SPPQ, various). While as a nation we spend more of our GNP on education than many other OECD nations, the range of expenditures among our *individual* states is similar to that among all OECD nations. Controlling for available resources per capita *and* per child, individual states exhibit an even wider variation of 5% to 30% compared to other nations' 13% to 34%. The overall spending in the states when controlling for available resources and numbers of children educated is much lower than in other countries, with 36 states spending less than the average spending per pupil in other countries—a much different picture than the average national-level data paints (NCES, 1996a, indicators 33a and 33b). When considering educational equity and adequacy issues, assessing state-level issues is paramount.

To sort out some of states' shared and divergent qualities, the methodology included three steps: 1) A statistical cluster analysis of broad factors across the fifty states, including general economic, sociological, and political indicators; 2) an overlay of other salient education finance case indicators on each socio-political clustering to facilitate selection of comparable states for more in-depth analysis of their cases; and 4) development of eighteen state case vignettes on litigation that apparently was decided on bases other than education clause language to illuminate how courts have used their constitutions within their socio-political contexts to uphold or overturn their finance systems.

The first step was based in cross-state political science research models, assessing states' economic, political, and sociological domains in order to understand the contexts within which state court justices worked as they delivered their decisions (Beavers & Waltz, 1998; Berry, Ringquist, Fording, & Hanson, 1998, 1999; Brace & Hall, 1999; Erikson, Wright, & McIver, 1989; Langer, 1999; Ringquist & Garand, 1999; Weber & Brace, 1999). This step in the methodology helped ensure that comparisons between states would be apt.

A variety of measures exist to capture social, political, and economic conditions within states (Barrilleaux, 1999; Berry et al., 1998; Erikson et al., 1989; Gray & Lowery, 1999; Langer, 1999; Wright, Erikson, & McIver, 1987). In recent years, data sources have enabled construction of measures over time (see, e.g. Beavers & Waltz, 1998; Berry & Fording, 1997; Berry et al., 1998; Langer, 1999). Many outcomes of interest in political science, such as election results, can be represented as dichotomous variables, making event history analysis a good means of determining what time-sensitive factors shaped outcomes (Berry, 1994; Brace, 2000; Willet & Singer, 1991; Yamaguchi, 1991). However, the method is imperfectly suited for finance litigation research. Case rulings are difficult to categorize discretely because decisions reflect a spectrum of court opinions rather than a clear set of wins or losses, making event history analysis and two-stage selection bias models inappropriate (Yamaguchi, 1991). Regression models are ill-fitted for the same reason. Further, regression has been shown to be unreliable with time-sensitive data, frequently predicting false significance (Berry, 1994).

Yet, exploring state-level differences necessitates an awareness of states' interactions with larger national trends (Brace, 1993). To situate states' socio-political and economic contexts within a broader national frame, a statistical clustering model established groupings of states at two different time periods during the history of finance litigation—one in the 1970's when states saw their first rounds of finance cases, and one in the 1990's when states were moving into litigation on grounds of adequacy (Enrich, 1995; Thro, 1994; Vergstegen & Whitney, 1997a). The models included nine variables grouped according to concepts related to the context of finance equity cases:

- ***General State Fiscal Inequity***: Regressive tax schemes and large disparity in levels of personal income would represent a context unfavorable to finance equity.
- ***Ideological Values***: Low tax effort and conservative ideologies would exist in contexts less favorable to finance equity.
- ***Educational Outcomes***: Historically strong commitment to educational provision would be reflected in low high school dropout rates and high achievement scores.
- ***Educational Challenge***: High proportions of African American students or students in poverty could interact with state contexts to lower educational outcomes; in other states a commitment to equity could overcome these historical challenges.
- ***Population Density***: As a general control, the measure accounts for the vast geographic differences that impact educational provision.

Each major category included one time-series indicator and one cross-sectional indicator. The data were read into SPSS 10. Descriptive analyses provided standardized Z-score statistics for each variable. Two K-means cluster models, one for each period, were run, including complete iterations, ANOVA tests, and cluster information for each state.

Overlay of Education Finance Case Facts to Pair States

Once the cluster analyses created groups of states with similar socio-political and economic contexts, the next step of the project was to assess states' education finance litigation contexts. Data for this portion of the study included the basic elements of the legal model of case interpretation: information on education spending, case approaches and outcomes, and state constitutional language. Within this layer of the methodology, the most critical factor in the study was the state education clause. Using the most cited classification of state constitutional guidelines for education clauses, each state was assigned its rating from the four-category system to assess the strength of the state clauses (Ratner, 1985; Thro, 1993). In that analysis, the lowest level of education clause only compels a state to establish an education system. The second level imposes some minimum standard, such as that there be a system, or that it be thorough and/or efficient. The next highest level adds some level of purpose to the clause, such as urging the legislature to use "all means" to establish the appropriate system, often in conjunction with a preamble stating why the state should interest itself in education. The fourth level makes education among the most important of state functions.

In addition, a record of states' equal protection clauses formed part of the overlay analysis. The clauses were classified according to four non-mutually exclusive types, with 1 equaling broad respect for individual human rights and pursuit of pleasure, 2 equaling clauses that offer a technical assertion that laws are applied equally, 3 equaling clauses noting the government's strong duty to protect individual property, and 4 equaling clauses that focus on why government is created and where power is vested.

To select states for analysis, each cluster grouping for each period was sorted according to its case outcome and its education clause strength, producing an ordered list of cases within a cluster period where the highest level of constitutional mandate in a case which upheld the finance system ranked next to the case with the lowest constitutional mandate in an overturned system. Other variables were examined to ensure maximum comparability between the conditions the states faced in deciding the cases. These two cases in each cluster for both periods were selected for comparison. Comparing these cases offers great potential for understanding how constitutional mandates affected—or did not affect—different decisions.

ANALYSIS OF STATISTICAL CLUSTERS

General Cluster Descriptions[1]

The five conceptual areas selected for clustering the states echoed familiar regional differences (Figure 1). The Deep South cluster captured the most ideologically conservative states, whose tax efforts were the second lowest in the nation. Membership in the South Central cluster included states such as Texas, Oklahoma, and Missouri, but also extended to include other southern states such as Florida and West Virginia. These states followed as second most conservative, exhibiting the least tax effort. Both sets of southern states followed similar patterns of economic equity, with their income inequity measures high compared to other states. They evidenced low population densities. Although both clusters exhibited low educational outcomes, the standardized educational score from college-going tests was by far lower in the Deep South states. Similarly, although both evidenced high proportions of their children in poverty, states in the Deep South clustered around much higher proportions of students of African American background than states in any other area. In terms of an historical disfranchisement to access quality education, these states are clearly different from other states in the nation.

---

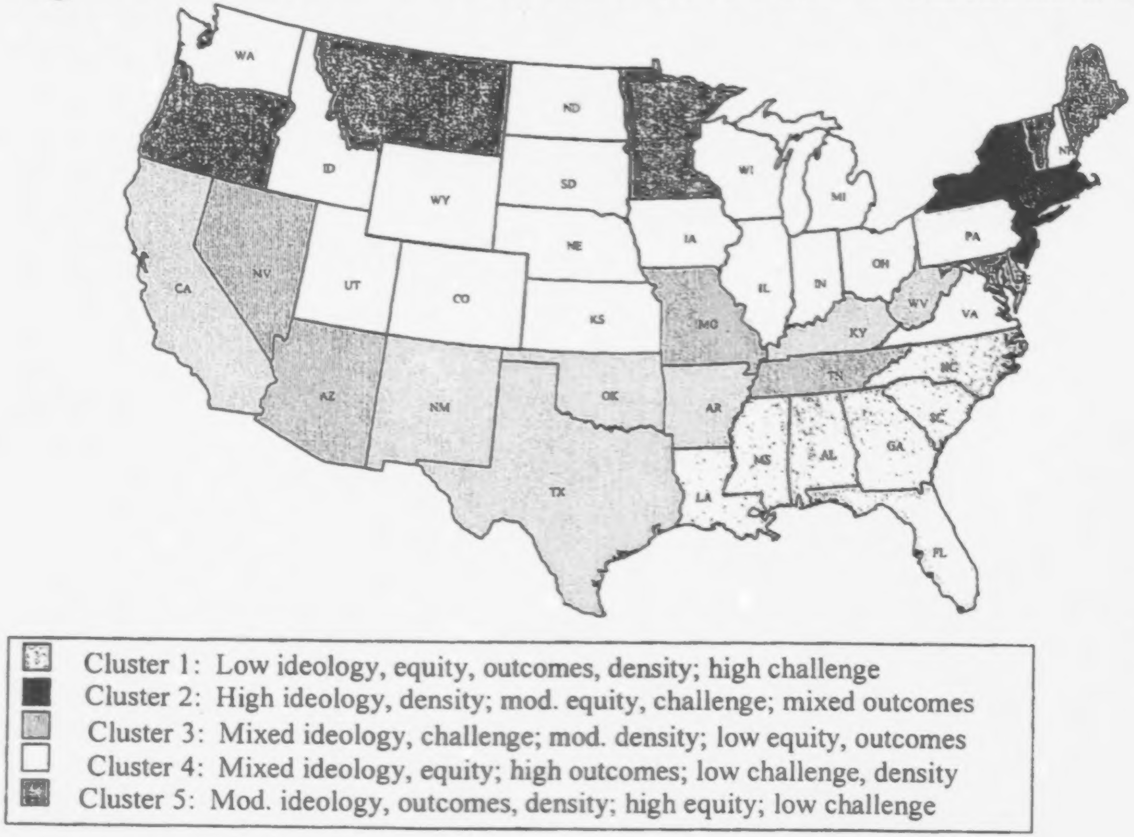
[1] Clusters were remarkably stable over time, with very few states shifting from the 1970's to the 1990's. Cluster characteristics varied slightly, most notably with states becoming more conservative in nearly every cluster.

"Midwestern" captured most of the states geographically in the Midwest, although Virginia and New Hampshire clustered with this group, as did several western states. The shared qualities of these states reflected a middle ground in the first period, with ideologies falling between other groups', economic equity measures reflecting a mix of generally well-distributed income coupled with regressive taxation. They shared low rates of poverty and African American population and population density, and high levels of high school completion and educational achievement as measured by the SAT and ACT.

The Eastern Seaboard cluster reflects distinct qualities in nearly every conceptual area in the analysis. Its ideology is politically liberal to a much greater degree than in other clusters. However, its equity measures do not follow suit, with income equity towards the middle of the spectrum coupled with regressive taxes. Low rates of educational challenge produce mixed outcomes in these states. High proportions of students complete high school, but achievement is nearly as low as in South Central states. This grouping of states also evidences by far the densest population.

Finally, several states clustered independent of geographic considerations, creating a mix of states with moderate population density. Although the cluster shares more similarities with the Midwest than with any other grouping, its dissimilarities are significant. Ideologically, these states are strongly liberal, including strong tax efforts. They also are the only group of states that exhibits strong income equity coupled with progressive tax rates. Educational outcomes are moderate, with few challenges.

Figure 1: 1990's Clusters of Socio-Political Factors


WA
OR
CA
ID
NV
MT
WY
UT
AZ
CO
NM
ND
SD
NE
KS
OK
TX
MN
IA
MO
AR
LA
WI
IL
MI
IN
OH
KY
TN
MS
AL
GA
FL
SC
NC
VA
WV
PA
NY
VT
NH
ME
MA
DE
Cluster 1: Low ideology, equity, outcomes, density; high challenge
Cluster 2: High ideology, density; mod. equity, challenge; mixed outcomes
Cluster 3: Mixed ideology, challenge; mod. density; low equity, outcomes
Cluster 4: Mixed ideology, equity; high outcomes; low challenge, density
Cluster 5: Mod. ideology, outcomes, density; high equity; low challenge

BEST COPY AVAILABLE

FINDINGS

Judicial Power to Select Interpretive Lenses

Across the eighteen cases, one fact was clear: nearly any one of the rulings could have been decided in other ways. The frequency with which justices "rejected" or "accepted" precedents, building cases from their preferences, was sobering. Since precedents pointed justices down a particular path of inquiry, the starting point determined the finish to the case. Citing Kentucky yielded a ruling for a well-defined educational system to be provided for all students; citing Illinois closed the case in favor of whatever system the legislators decided upon, no matter its relationship to the constitution or to what is best for the general public. Similarly, tracking down historical inequities and applying their existence to the framers' intent gave an anachronistic rationale to a decision, one that favored the state. Starting from a sense of the values inherent in providing an education for children produced a ruling that sought a better educational system.

Interwoven with justices' selection of precedent was the general interpretive approach they selected. Within this sample, the interpretive styles suggested four main lenses justices applied: 1) a search for whether the historical intent of the framers was for equal educational spending, 2) a search for a literal mandate to provide equal or adequate education; 3) an integrated analysis of the case and the larger constitutional and sociological contexts; 4) an analysis of what most people would consider the plain language of the constitution to demand.

Table 1 offers a classification of the cases in the sample. It is striking that the pattern of wins and losses directly corresponds to the interpretive lens the justices applied. With the exception of New Hampshire's addition of citing its historical relationship with education as additional information in its integrated analysis, all the historical and all the literal approaches ruled for the state. On the other hand, justices who opted for either a plain language reading or a holistic analysis of the case facts in conjunction with the states' and children's best general interests produced rulings for plaintiffs. Of course, two caveats are important to keep in mind in viewing this finding. First, these thoughts on interpretive lenses are preliminary, arising not from a systematic analysis of the cases from the outset, but rather emerging as a suggestive area for further research. Second, perhaps the utility of pursuing a classification system of case decisions is minimal: it might be expected that the more general readings of the case facts and constitutions would support wins, and the more discrete approaches such as a search for precise definitions or explicit historical language would produce the ends they do. Thus, this finding may be the outcome of an untapped ideological or procedural quality of different courts, of little more use than the case outcomes themselves.

Table 1: Interpretive Lenses for Cases

State	Outcome	Period	Ed. Clause Classification	Interpretive Lens
Maryland	Lost	1	2	Historical
Rhode Island	Lost	2	3	Historical
Illinois	Lost	2	4	Historical
Oklahoma	Lost	1	1	Literal
Virginia	Lost	2	2	Literal
Georgia	Lost	1	4	Literal
Maine	Lost	2	4	Literal
Alabama[a]	Mixed	2	1	
Massachusetts	Won	2	1	Holistic
Vermont	Won	2	1	Holistic
Tennessee	Won	2	1	Holistic
North Carolina	Won	2	2	Holistic
Wyoming	Won	1	2	Holistic
Washington[a]	Won	1	4	Holistic
Connecticut	Won	1	1	Holistic[b]
New Hampshire	Won	2	1	Holistic/Historical
West Virginia	Won	1	2	Holistic/Plain Lang.
Montana	Won	1	2	Plain Language

[a] Alabama never ruled on any substantive issues, only on procedural questions about the case.

[b] Connecticut's reasoning is among the least developed; however, their lengthy critique of the *Rodriguez* decision is based on more holistic grounds, hence its classification.

Education Clauses

A premise of the design of this study was that constitutional language should make a difference in court decisions. On first examining the clauses, it became evident that several had a rhetorical quality that was not captured in the standard classification systems assessing establishment requirements. However, separating education clause qualities into "establishment" and "rhetoric" did not lend any insight into rulings. A different consideration did, though, emerge from the reading of the cases. State education clauses seem to function more holistically with the broader constitution than previous classifications have assumed. At times courts cite the fact that education falls within the bill of rights section, making it a fundamental right; at other times they note it forms a part of the function of government section, making it a primary duty of the state. When the content and structure of other pertinent parts of the constitution are taken into account, clauses can be classified into "high," "medium," and "low," reflective of their strength for educational quality or equity. As part of the cross-state analysis, each of the clauses from the case states was reclassified to account for the spirit of the broader constitution (Table 2).

Table 2: Education Clause Classifications and Outcomes

State	Outcome	Ed. clause reclass.	Thro class.	Litigation Period	Cluster
Alabama	Mixed	Medium	1	2	Deep South
Connecticut	**Won**	Low	**1**	1	Eastern
Georgia	Lost	Low	**4**	1	Deep South
Illinois	**Lost**	High	4	2	South Central
Maine	Lost	Low	**4**	2	Other
Maryland	Lost	Medium	2	1	Other
Massachusetts	Won	High	**1**	2	Eastern
Montana	Won	High	2	1	Other
New Hampshire	Won	High	**1**	2	Midwest
North Carolina	Won	High	2	2	Deep South
Oklahoma	Lost	Low	1	1	South Central
Rhode Island	Lost	Medium	**3**	2	Eastern
Tennessee	**Won**	Low	**1**	2	South Central
Vermont	**Won**	Low	**1**	2	Other
Virginia	Lost	Medium	2	2	Midwest
Washington[a]	Won	High	4	1	Midwest
West Virginia	Won	Medium	2	1	South Central
Wyoming	Won	High	2	1	Midwest

In Table 2, states that ruled counter to what would be predicted by Thro's constitutional classification system are bolded. In the holistic approach since language that ranked "medium" might be predicted equally to rule for either party, those cases were not considered. Similarly, in the traditional classification system the states with the standard "2" rating are excluded. With a holistic classification, only four states ruled contrary to what was predicted; with the traditional classification system, twice as many did. Table 3 compares the outcomes for each of the classification systems.

Table 3: Comparison of Outcomes and Education Clause Classifications

Thro classification			Holistic Reclassification		
	Won	Lost		Won	Lost
Strongest	1	3	High	6	1
Strong	.	1	Medium	1	3
Establishment	4	2	Low	3	3
Weak	5	1			

In this comparison, it is important to recall that states were selected for the sample precisely because they ruled contrary to their education clause as traditionally classified. Hence, the mismatch between education clauses and outcomes in the Thro classification would be expected to be large, as it is. A holistic interpretation of the education clause, including its rhetorical qualities and the context of the entire constitution, corrects this mismatch and produces a more systematic relationship between case outcomes and constitutional guidelines. When viewed in these terms, the clauses evidence a clearer relationship between wins and losses than earlier classification schemes have. Whether the "spirit" of constitutions as they relate to education better reflect citizen values is worthy of further examination.

CASES INCLUDED IN THE STUDY

United States Supreme Court
Brown v. Board of Education, 347 U.S. 483 (1954)
San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973)

Alabama
Opinion of the Justices, 624 So. 2d 107 (Ala. 1993)
Pinto v. Alabama Coalition for Equity, 662 So. 2d 894 (Ala. 1995)
Ex Parte James, 713 So.2d 869 (Ala. 1997)

Arizona
Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973)
Roosevelt Elementary School District No. 66 v. Bishop, 179 Ariz. 233, 877 P.2d 806 (1994)
Hull v. Albrecht, 190 Ariz. 520, 950 P.2d 1141 (1997)
Hull v Albrecht, 192 Ariz. 34, 960 P.2d 634 (1998)

Arkansas
Dupree v. Alma School District, 279 Ark. 340, 651 S.W.2d 90 (1983)
Tucker v. Lake View School District No. 25, 323 Ark. 693, 917 S.W.2d 530 (1996)

California
Serrano v. Priest, 5 Cal.3d 584, 487 P.2d 1241 (1971) (Serrano I)
Serrano, 432 U.S. 907 (1977) (Serrano II)

Colorado
Lujan v. State Board of Education, 649 P.2d 1005 (Colo. 1982)

Connecticut
Horton v. Meskill, 172 Conn. 615, 376 A.2d 359 (1977)
Horton v. Meskill, 195 Conn. 24, 486 A.2d 1099 (1985)

Florida
Coalition for Adequacy and Fairness in School Funding, v. Chiles, 680 So.2d 400 (Fla. 1996)
Honore v. Florida State Board of Education (Leon County Circuit Court, filed January 1999)

Georgia
McDaniel v. Thomas, 248 Ga. 632, 285 S.E.2d 156 (1981)

Idaho
Thompson v. Engelking, 96 Idaho 793, 537 P.2d 635 (1975)
Idaho Schools for Equal Educational Opportunity v. Evans, 123 Idaho 573, 850 P.2d 724 (Ida. 1993)

Illinois
People v. Deatherage, 401 Ill. 25, 81 N.E.2d 581 (1948)
Committee for Educational Rights v. Edgar, 174 Ill.2d 1, 672 N.W.2d 1178 (1996)

Kansas
Knowles v. State Board of Education, 219 Kan. 271, 547 P.2d 699 (1976)
Unified School District No. 229 v State, 256 Kan. 232, 885 P.2d 1170 (1994)
Robinson v. State, No. 99-1193 (U.S. District Court, Kansas, filed May 21, 1999)

Kentucky
Rose v. Council for Better Education, 790 S.W.2d 186 (Ky. 1989)

Louisiana
Minimum Foundation Commission v. State, Docket No. 97CW0212 (La. Ct. App., June 29, 1998); supervisory or remedial writ denied (La. Sup. Ct., Nov. 13, 1998)

Maine
School Administrative District No. 1 v. Commissioner, 659 A.2d 854 (Me.1995)

Maryland
Hornbeck v. Somerset County Bd. of Educ., 295 Md. 597, 458 A.2d 758 (1983)
Bradford v. State Board of Education (described in related case of Montgomery County v. Bradford, 345 Md. 175, 691 A.2d 1281 (1997).)

Massachusetts
McDuffy v. Secretary of the Executive Office of Education, 415 Mass. 545, 615 N.E.2d 516 (1993)

Michigan
Milliken v. Green, 389 Mich. 1, 203 N.W. 2d 457 (1972), vacated, 390 Mich. 389, 212 N.W.2d 711 (1973)
East Jackson Public Schools v. State of Michigan, 133 Mich. App. 132, 348 N.W.2d 303 (1984) (Court of appeals only)

Minnesota
Skeen v. State, 505 N.W.2d 299 (Minn, 1993)

Missouri
Committee for Educational Equality v. State of Missouri, 878 S.W.2d 446 (Mo. 1994)

Montana
State ex. Rel. Woodahl v. Straub, 161 Mont. 141, 520 P.2d 776 (1974)
Helena Elementary School District No.1 v. State, 236 Mont. 44, 769 P.2d 684 (1989), amended, 784 P.2d 412 (1990)

Nebraska
Gould v Orr, 244 Neb 163, 506 N.W.2d 349 (1993)

New Hampshire
Claremont School District v Governor, 138 N.H. 183, 635 A.2d 1375 (1993)
Claremont School District v. Governor, 142 N.H. 462, 703 A.2d 1353 (N.H. 1997)
Opinion of the Justices, 142 N.H. 892, 712 A.2d 1080 (N.H. 1998)

New Jersey
Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973)
Abbott v. Burke, 100 N.J. 269, 495 A.2d 376 (1985) (Abbott I)
Abbott v. Burke, 119 N.J. 287, 575 A.2d 359 (1990) (Abbott II)
Abbott v. Burke, 136 N.J. 444, 643 A.2d 575 (1994) (Abbott III)
Abbott v. Burke, 149 N.J. 145, 693 A.2d 417 (1997) (Abbott IV)
Abbott v. Burke, 153 N.J. 480, 710 A.2d 450 (1998) (Abbott V)

New York
Board of Educ. Levittown Union Free School Dist. v. Nyquist, 57 N.Y.2d 127, 439 N.E.2d 359 (1982)
Campaign for Fiscal Equity v State, 86 N.Y.2d 307, 631 N.Y.S.2d 565 (1995)
Reform Education Financing Inequities Today (R.E.F.I.T) v. Cuomo, 86 N.Y.2d 279, 631 N.Y.S.2d 551 (1995)

North Carolina
Britt v. North Carolina State Board of Education, 86 N.C. App. 282,, 357 S.E.2d 432, affirmed mem. 320 N.C. 790, 361 S.E.2d 71 (1987)
Leandro v. State of North Carolina, 346 N.C. 336, 488 S.E.2d 249 (1997)

North Dakota
Bismarck Public School District #1 v. State, 511 N.W.2d 247 (N.D. 1994)

Ohio
Board of Education v. Walter, 58 Ohio St.2d 368, 390 N.E.2d 813 (1979), cert. denied, 444 U.S. 1015 (1980)
DeRolph v. State, 78 Ohio St.3d 193, 677 N.E.2d 733 (1997)

Oklahoma
Fair School Finance Council of Oklahoma, Inc. v. State, 746 P.2d 1135 (Okla. 1987)

Oregon
Olsen v. State, 276 Ore. 9, 554 P.2d 139 (1976)
Coalition for Equitable School Funding, Inc v. State, 311 Or. 300, 811 P.2d 116 (1991)
Withers v. State, 133 Or. App. 377, 891 P.2d 675 (1995); on remand, Withers v. State, No. 94-CV-0074-TM (Deschutes County Circuit Court). (Supplemental relief granted, 2/28/97)

Pennsylvania
Danson v. Casey, 484 Pa. 415, 399 A.2d 360 (1979)
Marrero v. Commonwealth, 709 A.2d 956 (Commonwealth Court 1998)

Rhode Island
City of Pawtucket v Sundlun,, 662 A.2d 40 (R.I. 1995)

South Carolina
Richland County v. Campbell, 294 S.C. 346, 364 S.E.2d 470 (1988)

Tennessee
Tennessee Small School Systems v. McWherter, 851 S.W.2d 139 (Tenn. 1993)
Tennessee Small School Systems v. McWherter, 894 S.W.2d 734 (Tenn.1995)

Texas
Edgewood Independent School District v. Kirby, 777 S.W.2d 391 (Tex. 1989)
Edgewood Independent School District v. Kirby, 804 S.W.2d 491 (Tex. 1991)
Edgewood Independent School District v. Meno, 893 S.W.2d 450 (Tex. 1995)

Vermont
Brigham v. State of Vermont, 166 Vt. 246, 692 A.2d 384 (1997)

Virginia
Scott v. Commonwealth, 443 S.E.2d 138 (Va. 1994)

Washington
Northshore School District No. 417 v. Kinnear, 84 Wash.2d 685, 530 P.2d 178 (1974)
Seattle School District No. 1 v. State, 90 Wash.2d 476, 585 P.2d 71 (1978)

West Virginia
Pauley v. Kelly, 162 W.Va. 672, 255 S.E.2d 859 (1979)
Pauley v. Bailey, 324 S.E.2d 128 (W.V. 1984)
State ex rel. Boards of Education v. Chafin, 376 S.E.2d 113 (W.V. 1988)

Wisconsin
Kukor v. Grover, 148 Wis.2d 469, 436 N.W.2d 568 (1989)
Vincent v. Voight, 223 Wis.2d 799, 589 N.W.2d 455 (2000)

Wyoming
Sweetwater v. Hinkle, 491 P.2d 1234 (1971)
Washakie County School District v. Herschler, 606 P.2d 310 (Wyo. 1980)
Campbell County School District v. State, 907 P.2d 1238 (Wyo. 1995)

Works Cited

Barrilleaux, C. (1999). Statehouse Bureaucracy: Institutional Consistency in a Changing Environment. In R. E. Weber & P. Brace (Eds.), *American State and Local Politics* (pp. 97-113). New York: Chatham House Publishers/Seven Bridges Press, LLC.

Beavers, S. L., & Waltz, J. S. (1998). Modeling Judicial Federalism: Predictors of State Court Protections of Defendants' Rights Under State Constitutions, 1969-1989. *Publius: The Journal of Federalism, 28*(2), 43-59.

Berry, F. S. (1994). Sizing up State Policy Innovation Research. *Policy Studies Journal, 22*, 442-456.

Berry, W. D., & Fording, R. C. (1997). Measuring State Tax Capacity and Effort. *Social Science Quarterly, 78*(1), 158-167.

Berry, W. D., Ringquist, E. J., Fording, R. C., & Hanson, R. (1998). Measuring Citizen and Government Ideology in the American States, 1960-1993. *American Journal of Political Science, 42*(1), 327-348.

Berry, W. D., Ringquist, E. J., Fording, R. C., & Hanson, R. (1999, April 17, 2001). *Measuring Citizen and Government Ideology in the United States* [computer data file]. 10th ICPSR version. Ann Arbor, MI: University of Michigan, Center for Political Studies. Retrieved April 25, 2001, from the World Wide Web: http://www.icpsr.umich.edu:8080/ABSTRACTS/01208.xml?format=ICPSR

Brace, P. (1993). *State Government & Economic Performance*. Baltimore: The Johns Hopkins University Press.

Brace, P. (2000). Personal communication. Houston.

Brace, P., & Hall, M. G. (1999, May 15, 1999). *State Supreme Court Data Project: Selected Midterm Data Summaries*. National Science Foundation, Rice University, and Michigan State University. Retrieved March 15, 2001, 2001, from the World Wide Web: http://www.ruf.rice.edu/~pbrace/statecourt/

Enrich, P. (1995). Leaving Equity Behind: New Directions in School Finance Reform. *Vanderbilt Law Rev., 101*, 185-194.

Erikson, R. S., Wright, G. C., & McIver, J. P. (1989). Political Parties, Public Opinion, and State Policy in the United States. *American Political Science Review, 83*(3), 729-749.

Gray, V., & Lowery, D. (1999). Interest Representation in the States. In R. E. Weber & P. Brace (Eds.), *American State and Local Politics* (pp. 241-267). New York: Chatham House Publishers/Seven Bridges Press, LLC.

Grissmer, D., Flanagan, A., Kawata, J., & Williamson, S. (2000). *Improving Student Achievement: What NAEP Test Scores Tell Us*. Arlington, VA: RAND.

Grissmer, D., Flanagan, A., & Williamson, S. (1997). *Does Money Matter for Minority and Disadvantaged Students? Assessing the New Empirical Evidence*. Paper presented at the 1977 NCES Summer Conference, Washington, D.C.

Hedges, L. V., Laine, R. D., & Greenwald, R. (1994). Does Money Matter? A Meta-Analysis of Studies of the Effects of Differential School Inputs on Student Outcomes. *Educational Researcher, 23*(3), 5-14.

Jenks, C., & Peterson, P. E. (1991). *The Urban Underclass*.

Kozol, J. (1991). *Savage Inequalities: Children in America's Schools*. New York: Crown Publishers, Inc.

Langer, L. (1999). Measuring Income Distribution across Space and Time in the American States. *Social Science Quarterly, 80*(1), 55-67.

Lundberg, P. J. (2000). State Courts And School Funding: A Fifty-State Analysis. *Alb. L. Rev.*(63), 1101.

McDermott, K. A. (1999). *Controlling Public Education: Localism vs. Equity*. Lawrence: University Press of Kansas.

NCES. (1996a). *Education in States and Nations: Indicators Comparing U.S. States With the Other Industrialized Countries in 1991* (NCES 96 160). Washington, DC: U.S. Department of Education, National Center for Education Statistics.

Orfield, G., & Ashkinaze, C. (1991). *The Closing Door: Conservative Policy and Black Opportunity*. Chicago: University of Chicago Press.

Ratner, G. M. (1985). A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills. *Texas L. Rev., 63*, 777.

Ringquist, E. J., & Garand, J. C. (1999). Policy Change in the American States. In R. E. Weber & P. Brace (Eds.), *American State and Local Politics* (pp. 268-299). New York: Chatham House Publishers/Seven Bridges Press, LLC.

Rothstein, R. (2000). Equalizing Education Resources on Behalf of Disadvantaged Children. In R. D. Kahlenberg (Ed.), *A Notion at Risk: Preserving Public Education as an Engine for Social Mobility* (pp. 31-92). New York: The Century Foundation Press.

Sparkman, W. (1990). School Finance Challenges in State Courts. In J. K. Underwood & D. A. Vergstegen (Eds.), *The Impacts of Litigation and Legislation on Public School Finance* (pp. 193-224). New York: Harper & Row.

SPPQ. (various). *State Politics & Policy Quarterly Data Resource.* The Practical Researcher section of State Politics & Policy Quarterly, the official journal of the State Politics and Policy Organized Section of the American Political Science Association, and the Department of Political Science of the University of Lincoln Nebraska. Retrieved April 4, 2001, from the World Wide Web: http://www.unl.edu/sppq.

Swenson, K. (2000). School Finance Reform Litigation: Why Are Some State Supreme Courts Activist And Others Restrained? *Alb. L. Rev., 63*, 1147.

Thro, W. E. (1993). The Role of Language of the State Education Clauses in School Finance Litigation. *West's Education Law Quarterly, 2*(2), 277-289.

Thro, W. E. (1994). Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model. *B.C. L. Rev., 35*, 597.

Underwood, J. K., & Vergstegen, D. A. (1990). School Finance Challenges in Federal Courts: Changing Equal Protection Analysis. In J. K. Underwood & D. A. Vergstegen (Eds.), *The Impacts of Litigation and Legislation on Public School Finance* (pp. 177-191). New York: Harper & Row.

Vergstegen, D. A., & Whitney, T. (1997a). From Courthouse to Schoolhouse: Emerging Judicial Theories of Adequacy and Equity. *Education Policy, 11*(3), 330-352.

Weber, R. E., & Brace, P. (Eds.). (1999). *American State and Local Politics*. New York: Chatham House Publishers/Seven Bridges Press, LLC.

Wenglinsky, H. (1997). *School District Expenditures, School Resources and Student Achievement: Modeling the Production Function.* Paper presented at the 1977 NCES Summer Conference, Washington, D.C.

Willet, J. B., & Singer, J. D. (1991). From Whether to When: New Methods for Studying Student Dropout and Teacher Attrition. *Review of Educational Research, 61*(4), 407-450.

Wilson, W. J. (1987). *The Truly Disadvantaged: The Inner City, the Underclass, and Public Policy*. Chicago: The University of Chicago Press.

Wood, R. C., & Thompson, D. C. (1996). *Education Finance Law: Constitutional Challenges to State Aid Plans--An Analysis of Strategies* (second ed.). Topeka: National Organization on Legal Problems of Education.

Wright, G. C., Erikson, R. S., & McIver, J. P. (1987). Public Opinion and Policy Liberalism in the American States. *American Journal of Political Science, 31*(4), 980.

Yamaguchi, K. (1991). *Event History Analysis* (Vol. 28). London: Sage Publications.

OUTLINE OF PRESENTATION

THE CONVERGENCE OF EDUCATION AND LAW:

A NEW CLASS OF EDUCATORS AND LAWYERS

Professor Sarah E. Redfield[1]

*{**Presenter's introductory note**: This presentation focuses on the growth in the field of education law and the need for educators and lawyers to work together with a knowledge of each others' disciplines. The full paper contains four parts discussing the convergence of education and law as follows: 1) the growth of the field of education law, 2) the increasing difficulties caused for schools by such growth, 3) the institutional infrastructure that contributes to such difficulties, and 4) the advantages of reformed structures and relationships. To stay within space limits, for purposes of this outline parts 3 and 4 are included dealing with the infrastructure of current methods for teaching about law and the value of improvement, and even these are included in abbreviated outline form. The conference presentation will expand on the topics. Also, anyone wishing more information should feel free to contact the author at sredfiel@maine.rr.com.}*

INTRODUCTION, TELL ME A STORY[2]

> *The professor just posted final grades for the class. She used the student numbers from the registrar, which happen to be social security numbers. The lists are always in alphabetical order. Some of the students complained that their privacy rights have been violated. The professor and registrar should have known?*
>
> *The Titusville school district just settled a case with gay student Timothy Dahle for $312,000. Dahle, now 19, alleged that he had been physically and verbally harassed since sixth grade; the school district claimed Dahle brought the treatment on himself.[3] The case is eerily like the million-dollar case brought by*

---

[1] Professor Redfield is on the faculty at Franklin Pierce Law Center in Concord, NH, where she founded the Education Law Institute. She is the author of *Thinking Like a Lawyer: An Educator's Guide to Legal Analysis and Research* (Carolina Academic Press 2002). She can be reached by email at sredfiel@maine.rr.com.

[2] When I was writing this, I asked a handful of my lawyer and educator colleagues to "tell me a story" illustrating my premise that schools would operate more effectively if more educators were trained in the legal context of their work and if more lawyers were more aware of the reality of day to day life in schools. One colleague replied, "Where do I begin?" and, indeed, the stories were numerous and salient. Only a few are reproduced here, but as the rest of the article suggests, there are oh-too-many more.

[3] *Dahle v. Titusville Area Sch. Dist.*, No. 00-174 (W.D. Pa.); Dee McAree, *Gay Student Settles Harassment Suit*, The National Law Journal A6 (Feb. 11, 2002); *School District Settles*, Pittsburgh Post Gazette B-9 (Jan. 18, 2002).

© Sarah Redfield 2001, 2002

James Nabozny against his Wisconsin school district in 1997.[4] *The Pennsylvania district should have known?*

Luke, a middle school student not classified as a student with disabilities, wore an obscene T-shirt in class, and when told to wear it inside out, lost his temper and lashed out at the teacher. The principal suspended Luke for ten days (making Luke's total for the year to date thirteen days). Luke's parents asked for the school records on the incident and other disciplinary incidents involving their son and other students, the parents having previously indicated to the school that they were seriously concerned about their son's inability to control his emotions. Someone should have known?

These stories illustrate legal principles, the knowledge of which could have saved the schools involved substantial amounts of money, not to mention time, resources, and peace of mind.[5] Some such stories are straightforward, others illustrate some simple school contextual realities that would alert attorneys to factual and legal concerns. And still others are of course more complicated stories, like the last obscene T-shirt scenario that concatenates constitutional due process [6] and first amendment[7] concerns with concerns arising under the Individuals with Disabilities Education Act (IDEA)[8] and the Family Educational Rights and Privacy Act (FERPA).[9]

As these stories suggest, sometimes knowing a few basics is all that is called for; sometimes knowing when to call for expert advice is the answer; sometimes knowing the school culture and practice offers the clue to resolution. For educators and their attorneys to have the requisite information and knowledge, there is a need to define a new class of educators and a new class of lawyers, each attuned to the contextual reality of the other's discipline.[10] Such a new class will establish law-informed educators and leaders who can act preventively to avoid

---

[4] *Nabozny v. Podlesney,* 92 F.3d 446 (7th Cir. 1996); *see also Sexual Harassment in Public Schools: Speeches from the 2000 HWLJ Symposium,* 12 Hastings Women's L.J. 123, 137 (2001).

[5] *See generally Limiting Your School's Exposure to Negligent Supervision and Safety Claims (*John W. McIlveen ed., LRP Publications 2001)..

[6] U.S. Constit. amend. XIV; *see generally Goss v. Lopez,* 419 U.S. 565 (1975) (constitutional due process).

[7] *See* U.S. Constit. amend. I; *Tinker v. Des Moines Community School District,* 393 U.S. 503 (1969) (symbolic black armbands cannot be prohibited absent disruption); *Catorina ex rel. Rewt v. Madison County School Board,* 246 F.3d 536 (6th Cir. 2001) (T-shirts with confederate flag protected speech under *Tinker*); *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000) (school suspension for refusing to remove Marilyn Manson T-shirt upheld); *Chambers v. Babbitt,* 145 F. Supp. 2d 1068 (D. Minn. 2001) (plaintiffs likely to prevail on "Straight Pride" T-shirt).

[8] 20 U.S.C.A. § 1400 et seq. (West 2000).

[9] 20 U.S.C.A. § 1232g (West 2000).

[10] The terminology "new class of lawyers, new class of educators" was coined in an interview with Dr. William C. Bosher, Dr. R. Daniel Norman, Dr. Richard Vacca, & Kate Kaminsky, Esq., Commonwealth Educational Policy Institute (CEPI), Richmond, VA; Dr. Bosher is Director and Dr. Norman, Deputy Director of CEPI; they have served as State Superintendent and Assistant Superintendent of Public Instruction for the Commonwealth of Virginia. Interview with CEPI (October 29, 2001).

© Sarah Redfield 2001, 2002

or minimize legal entanglements and act proactively to influence both litigation strategy and government policy. Such a class will also establish education-informed lawyers, apprised of both school practices and important educational research and policies, who can work collaboratively and preventively with their clients.

PART I. GROWTH, COMPLEXITY, CONVERGENCE

Growth

☐ Brown v. Board of Education[11]

☐ Current headlines

☐ Lawsuits[12]

☐ Legislation and regulation[13]

☐ Constant change in law[14]

☐ Supreme Court issues[15]

---

[11] *Brown*, 347 U.S. at 493-94.

[12] In 1960, the education law reporters published some 300 suits with schools named as parties; in 1970, it was about 700; and by 2000, over 1800. In 2001 there were a hundred federal court cases addressing just IDEA. Reported numbers for jury verdicts and judgments against schools show similar increases. These numbers are illustrative of a trend, but admittedly a superficial count. They were obtained by searching the West Education Reporter for cases with school, college or university in their titles. Of course, there are many more cases that involve these parties and school issues where the words do not appear in the title. A search in the text of cases for these same terms produces about twice the numbers. Nor do these numbers include unpublished, settled, or pending litigation. *See also* Cindy Collins, *Public Education Law ... Complex Social Issues Drive Growth of Education Law Practice*, 17 No. 7 Of Counsel 16 (1998); Todd A. DeMitchell, *The Educators & Tort Liability*, 154 Educ. L. Rep. 417 (2001) at n. 2. *But see* Perry A. Zirkel, *The "Explosion" in Education Litigation: An Update*, 114 Educ. L. Rep. 341, 351 (1997) (suggesting a plateau in litigation in 1980s and 90s).

[13] For example, Title 20, the education title of the United States Code Annotated, today occupies ten volumes. Education did not occupy its own title in the Code of Federal Regulations until 1981, when it encompassed about one thousand pages. Title 34 of the Code of Federal Regulations is now three fat volumes totaling some two thousand pages. This year, as in the past, Congress, state legislatures, and executive agencies across the country added heavily to this volume as they sought to achieve adequate education and effective school reform. The Bush administration's education bill, No Child Left Behind, is itself some 500 pages, No Child Left Behind Act of 2001, Pub. Law No. 107-110, 115 Stat 1425 (2001) (NCLB)..

[14] *See e.g.* re: religion, *Mitchell v. Helms*, 530 U.S. 793, 835 (2000), overruling *Meek v. Pittenger*, 421 U.S. 349 (1975) and *Wolman v. Walter*, 423 U.S. 229 (1977); *Agostini v. Felton*, 521 U.S. 203, 236 (1997) overruling *Aguilar v. Felton*, 473 U.S. 402 (1985) and *School Dist. of Grand Rapids v. Ball*, 473 U.S. 373 (1985). Further development of the religion/school precedent is offered by the recent voucher cases, *Zelman v. Simmons-Harris*, 2002 WL 1378662 (U.S. June 27, 2002) (holding that Ohio's Pilot Project Scholarship Program for school vouchers does not violate Establishment Clause of First Amendment). *See e.g.* re change generally, *Brown*, 347 U.S. at 495 rejecting *Plessy v. Fergusson*, 163 U.S. 537 (1896) (separate but equal); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940) (mandatory

☐ Increased lawyers[16]

Convergence

☐ Free speech example[17]

☐ School search example[18]

---

flag salute). *See also Monell v. Department of Social Services,* 436 U.S. 658, 663 *overruling Monroe v. Pape,* 365 U.S. 167 (1961) (municipal liability).

[15] *See e.g. Owasso Independent School Dist. No. I-011 v. Falvo,* 122 S. Ct. 934 (2002) (holding that peer grading of class work does not violate FERPA); *Board of Education of Independent Sch. Dist. No.92 v. Earls*, 2002 WL 1378649 (U.S. June 27, 2002) (holding that drug testing students of any extra-curricular activity does not violate Fourth Amendment); *Doe v. Gonzaga U.*, (no private right of action under FERPA); *Zelman v. Simmons-Harris*, 2002 WL 1378662 (U.S. June 27, 2002) (holding that Ohio's Pilot Project Scholarship Program for school vouchers does not violate Establishment Clause of First Amendment). *See generally* National School Boards Association, *Pending Supreme Court School Cases,* <http://www.nsba.org/cosa/chart.htm> (accessed Feb. 2, 2002).

[16] *See e.g.* Peter H. Ruger, *The Practice and Profession of Higher Education Law*, 27 Stetson L. Rev. 175 (1997); Roderick K. Daane, *The Role of University Counsel*, 12 J.C. & U. L. 399, 399 (1985); Robert D. Bickel, *The Role of College or University Legal Counsel*, 3 J.L. & Education 73, 77 (1974). *See also generally* Peter S. Popovich, *Education Law Public and Private*, 44 Educ. L. Rep. 927) (1988) (commenting on the increase in education law treatise and textual material).

[17] *See Tinker v. Des Moines Community School District, 393 US 503 (1969), Hazelwood School District v. Kuhlmeier, 484 US 260 (1988), Bethel School District No. 403 v. Frazer, 478 US 675 (1986).*

[18] *See e.g. New Jersey v. T.L.O., 105 S.Ct. 733 (1985), Vernonia 47J v. Acton, 515 U.S. 1646 (1995), Board of Education of Independent Sch. Dist. No.92 v. Earls, 2002 WL 1378649 (U.S. June 27, 2002) (holding that drug testing students of any extra-curricular activity does not violate Fourth Amendment), Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997), cert. denied, 118 S. Ct. 412 (1997).*

© Sarah Redfield 2001, 2002

PART 2. DIFFICULTIES

Litigation for public interest and reform[19]

Litigation as threat and as frustration[20]

The role of lawyers[21]

PART 3. ISSUES OF INFRASTRUCTURE

To increase the likelihood of wise decision-making and to avoid the difficulties outlined as law and education converge, many legal and education experts have written for years about the importance of educating teachers and other educators about the law.[22] A recent study of Texas educators by Dr. Mark Littleton and his colleagues reviewed the existing research on educator legal knowledge. Dr. Littleton concluded that while more research is needed[23] the existing research has "identified that school officials displayed an alarming lack of knowledge about legal issues that affect them on a daily basis."[24] Significantly, even where school leaders do demonstrate legal knowledge they have "difficulty applying that knowledge to situations that occur on a daily basis."[25] The Texas study is consistent with other surveys showing that educators' knowledge of core legal principles is limited and that educators themselves recognize the need to learn more about school law.[26]

---

[19] *See generally Law and School Reform: Six Strategies for Promoting Educational Equity* (Jay P. Heubert ed., Yale U. Press 1998) 9-17.

[20] "I believe that the whole focus of education has been changed by our overly litigious society. Many like to blame lawyers for over litigation, and in part, they may be to blame, but every lawyer must have a client to pursue an action. The more responsibility that we place on schools, the higher the expectation of the consumer. When the impossibly high expectations are not met, which we know that they can never be based upon the societal pressures and financial limitations described above, parents turn to litigation to try to solve the problems with education. This drains districts of resources and the attention to the educational program is diverted to defend the lawsuit. More significantly, however, educators feel as though they are under attack; the veterans with experience and expertise are fleeing to retire and many bright young people are not entering the field of education at all. This just exacerbates the problems that already exist in education. Interview by Dr. Carol Roberts with Rosemary Mullaly, Esq., Legal Department, Chester County (PA) Intermediate Unit (September 2001). *See also Selecting and Working with a School Attorney: A Guide for School Boards*, <http://www.nsba.org/cosa/About/ aboutschlaw.htm#historic> (accessed October 2, 2001); Heubert ed. *supra* n 20 at 5. The idea that school leaders must feel in control is not unique, *see* Phillip C. Schlechty, *Shaking Up the School House* 14-18 (Jossey-Bass 2001) (discussion of more government involvement in schools) ("To change a system leaders must control that system and feel that they are in control. Today many education leaders – policymakers, administrators and teachers – feel powerless…If educational leaders are to improve these systems, however, they must learn to control them; for without control there can be no systematic improvement…To improve the systems they lead leaders must first understand those systems.").

[21] Jan G. Borelli, *Who's the School Lawyer Working For?* AASA, The School Administrator Web Edition, Feb. 2000 (quoting one superintendent: "I have to admit to being blatantly naïve about the what's what and who's who of school legal operations."), <http://www.aasa.org/publications/sa/2001_02/reeves_side_lawyer_work_for.htm> (accessed Oct. 31, 2001). *See also* The MacCrate Report: Building the Education Continuum Conference Proceedings 18 (West 1993).

[22] *See e.g.* Robert J. Simpson, *Teaching Law and Education Outside Law Schools* (1975, ERIC Document ED 163826); Mark G. Yudoff, *Law and Educators: Research Past and Future* (1979, ERIC Document EJ220447); ECS Law and Education Center, *Footnotes*, December 1980 (1980 ERIC Document ED 203 455); Brenda Davis & James Williams, *Integrating Legal Issues into Teacher Preparation Programs* (1992, ERIC Document ED 347 139); *Teaching Teachers About Law in the 90s: Models, Methods, and Means* (1993, ERIC Document ED364 482); D. Gullatt & J. Tollett, *Education Law A Relevant Course for All Teacher Education Programs* (1995 ERIC Document ED 389-695); InfoGuide, School Law (1993) <http://www.lectlaw.com/files/lwr05.htm> (accessed October 17, 2001); Nathan L. Essex, *School Law and the Public Schools: A Practical Guide for Educational Leaders*, xvii (Allyn & Bacon 1999); Isaac Ersoff, *Law and the Professional Educator* (2000), <http://www.oregonvos.net/~iersoff/CenterforEducationLaw/LawandtheProfessionalEducatorBookOneAug2000/Ch

Despite the many studies and reviews, the progress toward educating educators about the law seems slow.[27] Admittedly, it is difficult to gauge the advent or extent of law education required to be or in fact actually offered to educators. There is no clear system to assure such education, but rather an accumulation of standards that are diverse and largely indirect.[28] There are national frameworks, which may or may not be reflected in state aspirations, which may or may not become part of state law as statute or regulation, which may or may not be actualized into educator education schema through schools of education and other professional development providers.[29]

Relevant national frameworks and standards exist at the educator level and at the institutional level. Together they could be read to support the idea that many educators – particularly administrators and those involved with special education – need knowledge of the legal context and should be exposed to such knowledge during their own educations. But the message is not straightforward, uniform or universal. The deliver is even less clear. This part of the paper first discusses frameworks and standards of various types and levels to begin to ascertain the extent of efforts to incorporate the legal context in educating educators. Teacher, special educator, and administrator requirements are reviewed via national frameworks, state law, and schools of education. The translation from such standards to schools of education is also reviewed. Against this background, this part at least poses the question of why we find the current patchwork.

---

apters/ChapterOne.html> (accessed October 17, 2001); Vicki Nord Petzko, *Preventing Legal Headaches*, Principal Leadership, 34-37, April 2001.

[23] Mark Littleton, Russ Higham & Kelli Styron, *Analysis of Legal Knowledge of School Officials in Texas*, Education Law Association 6 (2001) <http://www.tarleton.edu/~edulab/ELAPaper.doc> (accessed December 1, 2001); Perry A. Zirkel & Kathleen A. Sullivan, *Education Law Texts Usage: Survey Results*, 27 J.L. & Educ. 423 (1998) ("Despite increasing interest in education law, research regarding training in education law for teachers and administrators, remains limited.")

[24] Littleton *id* at 3.

[25] Littleton, supra n. 24 at 4.

[26] *See e.g.* Gary L. Reglin, *Public School Educators' Knowledge of School Law*, Ill. School J. (Spring 1990); Petzko, *supra* n. 22, at 34; Littleton, *supra* n. 23 at 12, 24; Louis Fisher & Gail Sorenson, *School Law for Counselors, Psychologists, and Social Workers*, 215-225 (Addison-Wesley 1996). Interestingly, the author was unable to find similar surveys of legal professionals.

[27] From anecdotal information and observation, the reverse seems equally true.

[28] Telephone interview with Pamela Ehrenberg, National Council for Accreditation of Teacher Education (April 1, 2002).

[29] This could be because of state law or because of such institutions own initiatives.

© Sarah Redfield 2001, 2002

The national frameworks are neither inherently consistent in their message nor binding across levels or among groups.

☐ Teachers: *Interstate New Teacher Assessment and Support Consortium (INTASC*[30] *and National Board for Professional Teaching Standards (NBPTS).*[31]

☐ Special education : *INTASC's Model Standards for Licensing General and Special Education Teachers of Students*[32]

☐ Administrators: *Interstate School Leaders Licensure Consortium's (ISLLC) Standards for School Leaders*[33]

☐ Schools of education: National Council for Accreditation of Teacher Education (NCATE)[34]

PART 4. A NEW CLASS

What you don't know can hurt you. The converse aphorism is also true. What you do know can help you. How can difficulties engendered by too much law and not enough knowledge of the legal context be ameliorated? What will be the benefits? To return to the opening stories, at a very basic level, for example, law education assures that the requisite internal reports and other calls are made to report abuse.[35] It assures that social security numbers are not posted as student IDs. At a more intricate level, it assures that educators recognize complicated stories such as the T-shirt story as complicated.

---

[30] Interstate New Teacher Assessment and Support Consortium, *Model Standards for Beginning Teacher Licensing and Development: Resources for a State Dialogue (*Washington, DC: Council of Chief State School Officers 1991), <http://www.ccsso.org/intascst.html#draft> (accessed March 28, 2002). These are not standards. They are principles or models. The INTASC describes itself as a starting point for dialogue. INTASC, *id* at 1.

[31] National Board for Professional Teaching Standards (NBPTS). NBPTS reports that as of March 2002, legislative and policy action creating incentives and recognition for National Board Certification has been enacted in 48 states and in approximately 411 local school districts, including the District of Columbia. <http://www.nbpts.org >

[32] Interstate New Teacher Assessment and Support Consortium *Model Standards for Licensing General and Special Education Teachers of Students with Disabilities: A Resource for State Dialogue (*Washington, DC: Council of Chief State School Officers 2001), <http://www.ccsso.org/pdfs/SPEDStds.pdf (accessed March 28, 2002).

[33] *See* Interstate School Leaders Licensure Consortium, *Standards for School Leaders* (ISLLC) (Washington DC, Council of Chief State School Officers 1996), Standard Six. <http://www.ccsso.org/isllc.html> (accessed March 27, 2002). Thirty-four states report that they have adopted ISLLC standards or standards in close correlation with ISLLC standards. <http://www.ccsso.org/pdfs/ isllcchart00.pdf (accessed March 298, 2002).

[34] The National Council for Accreditation of Teacher Education (NCATE) is the "national professional accrediting agency for schools, colleges, and departments of education that prepare teachers, administrators, and other professional school personnel." NCATE is so recognized by the Department of Education. <http://www.ncate.org/2000/unit_stnds_2002.pdf (accessed March 28, 2002). 6. There is also The American Association of Colleges for Teacher Education (AACTE), which is "a national voluntary organization of colleges and universities that prepare the nation's teachers and other educational personnel." < http://aacte.org/Membership_Governance/intro-aacte.htm> (accessed April 4, 2002).

[35] *E.g.* Kentucky provides: "Any person who knows or has reasonable cause to believe that a child is dependent, neglected or abused shall immediately cause an oral or written report to be made to a local law enforcement agency or the Kentucky State Police…" KY ST § 620.030(1) (1999); or New Hampshire: "Any physician, surgeon, county medical examiner, psychiatrist, resident, intern, dentist, osteopath, optometrist, chiropractor, psychologist, therapist, registered nurse, hospital personnel (engaged in admission, examination, care and treatment of persons), Christian

More generally, being law-informed allows schools to avoid costly conflict and litigation, either to keep themselves out of court or to prevail (quickly) when litigation arises. As two Arizona superintendents reflected concerning how administrators respond to a threat to call a lawyer:

> Such threats often trigger superintendents or their administrative teams into a panic-driven "circle the wagons" frenzy. Their knee-jerk reaction is to immediately call the school district's legal counsel and consume billable minutes exploring the issue. While some matters require this dialogue, we suggest that superintendents who are knowledgeable about the law, understand its application to the basic principles of school operation and insist upon ongoing training of site administrators are less likely to be mired in threatened lawsuits. These superintendents are also more inclined to address the day-to-day issues with minimal consultation with attorneys.[36]

Current standards for liability for sexual harassment offer just one of many possible examples where the knowledge described by these Arizona administrators would work. A superintendent or principal who knows the law about sex discrimination will know the standard for imposing liability on the school district for harassment, including peer-to-peer sexual harassment. For the latter, the law requires that the complaining student show that the school acted with deliberate indifference.[37] Knowing the deliberate indifference standard, the administrator can address potential problems by putting in place an adequate reporting and investigating system to eliminate situations where such problems will be ignored. Since the liability will lie only where there is "deliberate indifference," a reasonable, preventive, pre-existing system for review and response to harassment claims (this does not mean all claims are valid, rather that there is a system to investigate, respond and follow up) can put the administrator in a position to avoid school liability.

Science practitioner, teacher, school official, school nurse, school counselor, social worker, day care worker, any other child or foster care worker, law enforcement official, priest, minister, or rabbi or any other person having reason to suspect that a child has been abused or neglected shall report the same in accordance with this chapter." N.H. Rev. Stat. Ann. § 169-C29 (1990). *See also* Child Abuse Prevention and Treatment Act, 42 U.S.C.A. § 5101 et seq. (West 1995 & Supp. 2001); *see generally* National Clearinghouse on Child Abuse and Neglect <http://www.calib.com/nccanch/statutes/index.cfm> (accessed December 1, 2001) (referencing state statutes); Fisher & Sorenson, *id.*, at 215-225.

[36] Philip M. Corkill & J. Robert Hendricks, *Learning the Law and Loving the School Attorney Less*, AASA The School Administrator Web Edition (November 1997) <http://www.aasa.org/publications/sa/1997_11/corkill.htm> (accessed October 21, 2001).. *See also generally*, Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 L. & Society Rev., No. 3, 713 (1999) <http://www.polisci.wisc.edu/users/kritzer/research/legalprof%5Cpostprof.htm>

[37] *Davis*, 526 U.S. at 630. *Davis* also requires that the harassment be severe and pervasive, be known to a person in a position to address the problem, and interfere with the student's ability to receive an education.

© Sarah Redfield 2001, 2002

Similarly, knowing the law allows educators to limit their liability under the typical doctrines of qualified immunity. The Titusville anecdote in the opening stories is telling. The liability standard is well illustrated by Nabozny, the Wisconsin case (of which the Dahle story at the opening appears to be a mirror image) settled in 1997 for just under a million dollars.[38] In Nabozny, Jamie Nabozny sued his school district and several school district officials for what can only be described as a long pattern of egregious treatment, which Nabozny alleged was based on his sexual orientation and gender.[39] The school's response was of the "boys will be boys" variety.[40] The Seventh Circuit Court of Appeals, in reviewing the case before it was settled, explained the standard for liability as whether the school district officials knew or should have known at the time that their actions violated the student's legal and constitutional rights. If they knew or should have known, they faced liability; otherwise, they would be entitled to qualified immunity.[41] But how many educators would have known the established state of the law on discrimination and harassment, particularly the law on equal protection and sexual preference and orientation as it stood in the 90s? Where would they have learned the law? Had they actually known (as opposed to should have known) at the time, would the administrators in Nabozny have put in place a sex-neutral system for processing complaints of harassment? That the Dahle case should be so reminiscent of Nabozny gives further grounds for consideration. After Nabozny, admittedly in a different state and circuit, how many educators should have known?[42]

In our currently litigious society, it is impossible to completely avoid being sued, but it is possible to act carefully to limit the number of suits or the grounds for litigation, and to enhance the chance for quick resolution. In the Nabozny and Dahle situations, for example, law-informed administrators and educators might well have had in place an adequate harassment policy and the whole situation might well have been resolved efficiently and without harm to the student. Similarly, administrators who know the law about due process for suspending or expelling a student, or who know the law about school searches, can, by following the correct procedures, vastly limit their potential liability..

Knowledge such as this, preventively used, can save schools and districts in both dollars and time, both of which can be better devoted to education. Indeed, armed with knowledge about the legal parameters, administrators may well choose alternative dispute resolution mechanisms. As the Arizona administrators found:

> What benefits will accrue to those who become familiar with legal issues? The most obvious is economic savings in your operations budget. A suburban district in Tucson, Ariz., recently slashed its legal expenses by 50 percent ($100,000) by proactively promoting statutory and policy awareness and

---

[38] *Sexual Harassment in Public Schools, supra* n. 4 at 137.

[39] *Nabozny*, 92 F.3d 446.

[40] *Id* at 451.

[41] *Id* at 455. Thus, the critical questions in this case are whether the law 'clearly establishes' the basis for Nabozny's claim, and whether the law was so established in 1988 when Nabozny entered middle school." Immunity not found.

[42] That the Dahle case settled relatively quickly may be some indication of the answer.

> compliance at every school site, by seeking more internal resolution and intervention, by conducting more in-house research of legal concerns and by consciously decreasing the number of "less necessary" calls to the attorney.
>
> In the past two years, not only has the district's initiative and diligence translated into significant cost savings, but the number of cases in litigation also has been reduced. Moreover, several districts we surveyed indicated a greater sense of autonomy by using legal counsel as one resource but not the key player in making decisions.[43]

This last point from the Arizona administrators seems particularly salient in the current era of "reform." Not only can knowing the law help educators act preventively and reasonably, it can help them play a clearly necessary role in litigation strategy and legal development. It is crucial that educators at all levels understand the process by which law and regulations are enacted. This will enable them to act decisively in their own spheres of expertise.[44] It will assure their voices be heard and be influential as school issues are considered and defined. It is thus very important that educators know some law basics, particularly about the various sources of law, including administrative law.

One clearly obvious example of the importance of law informed educators and education informed lawyers is IDEA, truly a legalization of an educational mission. It is useful to remember that the genesis of what is now a vast statutory and regulatory scheme was a consent order, likely drafted in the first instance by attorneys.[45] One can only speculate now as to what the schema may have been had educators written that first draft. As it stands, IDEA is extraordinarily detailed in its legal requirements, but for the intended outcomes of IDEA to be achieved will require more than just legal requirements:

> This will happen only if educators and lawyers learn to work together more effectively. The legalistic model does, in fact, have serious limitations. Due process by its nature leads schools and parents to view each other as adversaries. Schools, parents, and lawyers must learn to collaborate, not just litigate. Moreover, the dynamic interaction of school systems with the legal

---

[43] Corkill & Hendricks, *supra* n. 36; Joseph R. McKinney & Theodore L. Drake, *The School Attorney and Local Educational Policy-Making*, 93 Educ. L. Rep. 476 (1994) ("The evidence indicates overwhelmingly that lawyers substantially impact local educational policy-making. Attorneys not only legitimize school policies, they initiate, clarify, write and oversee policy implementation.")

[44] Corkill & Hendricks, *supra* n. 36 ("Moreover, several districts we surveyed indicated a greater sense of autonomy by using legal counsel as one resource but not the key player in making decisions.")

[45] *See generally* Thomas Hehir & Susan Gamm, *Special Education*, in *Law and School Reform* (Heubert ed.), *supra* at 213..

© Sarah Redfield 2001, 2002

> processes established by special-education law often results in an exaggerated focus on process instead of on the needs of individual children."[46]

A second major example here, indeed one that will define education for this decade and decades to come, is the matter of education reform. Such reform has been almost entirely law based, but too little attention has been paid to the way in which the sources and structure of law, and the attitude and training of lawyers, impose their own limitations on reform and its likely success.[47] Some surveys and research have discussed the extent to which "educational policy-making has been 'lawyerized'" and observed this to be a dangerous trend toward educators' loss of professional autonomy and sound educational policy-making.[48] As the Education Commission for the States has observed, we do not want only lawyers as our "gatekeepers" for legislative and legal school policy.[49] Nowhere is this more true than in the agenda for school reform where a significant role has need played by equity and adequacy litigation[50] for reform is illustrated in adequacy litigation:

> Ironically, the crucial lesson to be learned from past litigation is that if lawyers hope to alter the legal distribution of education fundamentally, they cannot rely, as they have in the past, primarily on traditional legal concepts and remedies. Instead, they must turn to advances in educational policy made outside the courtroom and shift their litigation to reflect the knowledge acquired by educators over the past few decades. While standards of equity revolve around concepts familiar to lawyers and legal discourse, a case built around a constitutional right to an 'adequate' education demands an educator's input.[51]

---

[46] *Id.* at 207.

[47] *See generally e.g.* Todd DeMitchell & Richard Fossey, *The Limits of Law-Based School Reform: Vain Hopes and False Promises* (Technomic Pub. 1997); *Law and School Reform: Six Strategies for Promoting Educational Equity* (Jay P. Heubert ed., Yale U. Press 1998).; Todd A. DeMitchell, *The Legal Confines of School Reform*. AASA The School Administrator Web Edition (November 1997) <http://www.aasa.org/publications/sa/1997_11/DeMitchell.htm> (accessed October 21, 2001) ("Although the law has been the vehicle for launching school reform efforts, little attention has been paid to the way legal mechanisms enable and constrain effective school reform."). *See also* Stacie Rissman Joyce, *The School District Attorney: Trends of Legal Involvement in Education*, 10 NOLPE Sch. L.J. 193 (1983).

[48] McKinney *supra* n. 43 at 476.

[49] ECS, *supra* ERIC Document ED 203 455. *See also generally,* McKinney& Drake, *supra* n. 43 at 480; Andrew Trotter, *Flagrante Delicto,* 177 Am. Sch. Bd. J. 12, 13, 14 (Dec 1990); Herbert M. Kritzer, *Legal Advocacy: Lawyers and Non-lawyers at Work* (U. Mich. P.1998) at 10-11, 193. *See also, e.g.* Rapp, supra n. 27, at § 1.02(3) (a) (I). *But see* Suzanne R. Painter, *Superintendents and School District Attorneys: Who's In Charge Here*? 129 Educ. L. Rep. (1998) (suggesting that the policy role of attorneys may be overstated); *see also* Suzanne Painter, *School District Employment Practices Regarding School Attorneys*, 27 J.L. & Educ. 73 (1998).

[50] *See e.g.* Dayton supra n. 44.

[51] Molly S. McUsic, *School Finance* in Heubert ed., *supra* n. 20 at 90.

Both reform and special education thus offer critical examples of the need for a new class of lawyers, those trained and open to education and children-centered issues, those whose skill set includes negotiation and mediation and long-term planning. They also offer examples of a new class of educator trained to understand and work successfully in the law and policy arenas.

CONCLUSION: TELL ME A NEW STORY

Although law has become almost omnipresent in school issues, the relationship between lawyers, law, child advocates, and educators does not seem to have improved commensurately. So much easier to think that all educators need to know is how to teach, all lawyers need to know is legal research and advocacy skills.

Given advantages like those discussed in the previous part of this paper, how much education should a lawyer know? At least enough to understand the impact of the key pieces of statutory and constitutional law. How much law should an educator know? Enough to assure that our educational institutions are reflecting society's core decisions on constitutional rights. Enough to anticipate legal problems and avoid them by preventive action, or, if not avoid them, at least know when to call for legal counsel early in the dispute. Enough to consider legal implications in policy setting and to participate appropriately in the legislative and administrative process, that is enough to be themselves the gatekeepers of the educational policy field. At least educators should demand and take that one ed law course, preferably one that is a relatively in depth survey of basic principles and introduction to legal reasoning.

Again, the opening stories are illustrative. Educators need some basic knowledge, not necessarily in depth, but with sufficient breadth, to know that symbols like a Star of David may have implications beyond gang activities, to know that students and parents have statutory privacy rights, to know the general parameters of free speech and due process. Beyond this, they would be well served with another course that deals with the civil rights issues, and perhaps a third that deals with the legislative and administrative system. Equally crucial, in light of liability and immunity standards, is educators' need to have access to conferences and seminars on a continuing education basis to keep current on legal developments.[52]

Dr. Ellenmorris Tiegerman, founder and Director of the School for Language and Communication Development, observes,

> the interface of education and law creates a nexus, which is both conceptual and pragmatic in nature. You are creating a new professional area that arises out of the plethora of cases in the field of education. The 'legal educator' can provide a holistic view of the complex issues, which have

---

[52] *See e.g. Tips for the First Year Principal* 11/21/96 Clearing House 77, 1996 WL 11548237 The Clearing House. ("Keep current with changes and new programs. You simply must keep current regarding educational issues (school law, in particular).").

© Sarah Redfield 2001, 2002

> historically been handled by either educators or lawyers. It has been my experience that lawyers and educators are trained theoretically to function in different service contexts and, as a result, their viewpoints are limited by their separate training. Although they both contribute to part of the process, the translation of information often results in misunderstanding, miscommunication and limited thinking. The problem that presently exists is that educators and lawyers need to train in each other's field, to establish a common lexicon, theoretical framework and operational system to respond to issues that arise in schools.[53]

One way to achieve the cross-disciplinary expertise that Dr. Tiegerman suggests is through more interdisciplinary work, more encouragement by education administration advisors for their students' interest in law, more law professors opening their classes to educators and vice versa. Through these and related efforts, the response to the call for this new class of lawyers and educators remains will improve the understanding and workings of our education system for the benefit of those who work within and around it, and for the benefit of those children and students whom it serves.

---

[53] Redfield, *Thinking* at ix.

© Sarah Redfield 2001, 2002

Asked and Answered:
Preparing Ethical, Legally Literate Future School Leaders

Education Law Association
48th Annual Conference
November 14-16, 2002
New Orleans, LA

Margaret A. Noe, J.D., Ph.D.
University of Illinois at Springfield
Assistant Professor,
Educational Leadership
Abraham Lincoln Presidential Center for
Governmental Studies and Public Policy
noe.margaret@uis.edu

"Asked and Answered"

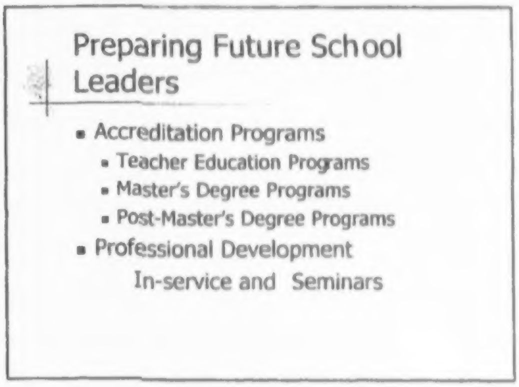
Preparing Ethical, Legally Literate
Future School Leaders

Education Law Association

48th Annual Conference
November 14-16, 2002
New Orleans, LA

Margaret A. Noe, J.D., Ph.D.

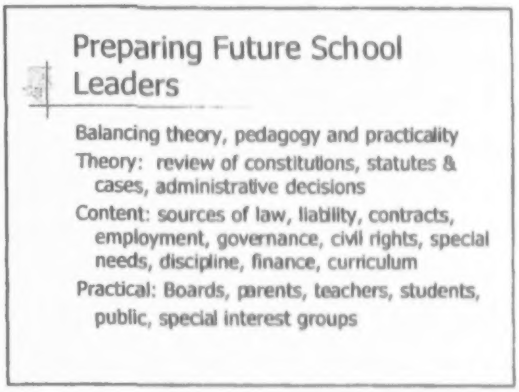
- University of Illinois at Springfield
- Assistant Professor,
  - Educational Leadership
  - Abraham Lincoln Presidential Center for Governmental Studies and Public Policy
  - noe.margaret@uis.edu
  - (217) 206-7424



Preparing Future School Leaders

- Accreditation Programs
  - Teacher Education Programs
  - Master's Degree Programs
  - Post-Master's Degree Programs
- Professional Development

  In-service and Seminars



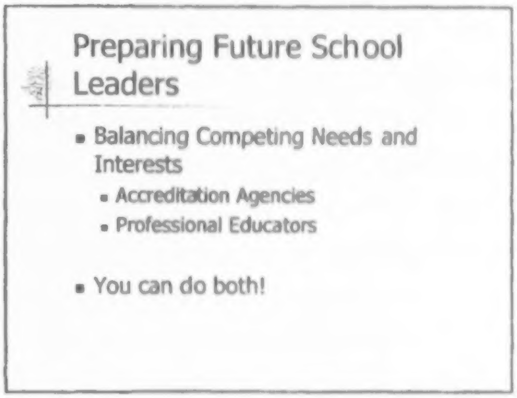
Preparing Future School Leaders

Balancing theory, pedagogy and practicality

Theory: review of constitutions, statutes & cases, administrative decisions

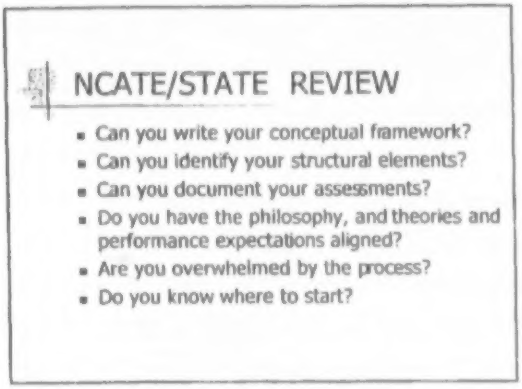
Content: sources of law, liability, contracts, employment, governance, civil rights, special needs, discipline, finance, curriculum

Practical: Boards, parents, teachers, students, public, special interest groups



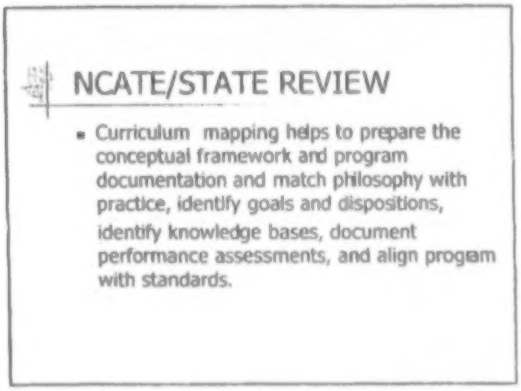
Preparing Future School Leaders

- Balancing Competing Needs and Interests
  - Accreditation Agencies
  - Professional Educators
- You can do both!



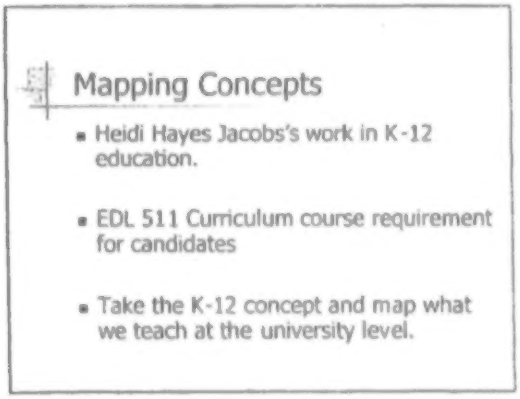
NCATE/STATE REVIEW

- Can you write your conceptual framework?
- Can you identify your structural elements?
- Can you document your assessments?
- Do you have the philosophy, and theories and performance expectations aligned?
- Are you overwhelmed by the process?
- Do you know where to start?



NCATE/STATE REVIEW

- Curriculum mapping helps to prepare the conceptual framework and program documentation and match philosophy with practice, identify goals and dispositions, identify knowledge bases, document performance assessments, and align program with standards.



Mapping Concepts

- Heidi Hayes Jacobs's work in K-12 education.
- EDL 511 Curriculum course requirement for candidates
- Take the K-12 concept and map what we teach at the university level.

Why?

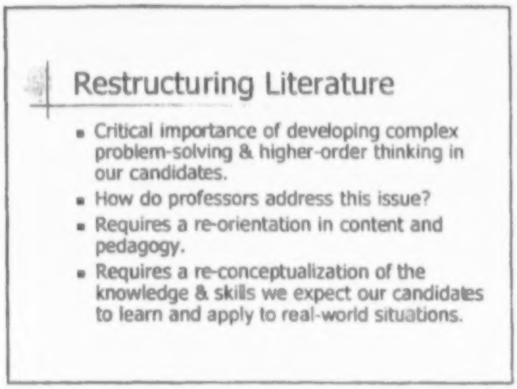
- Logical way to map out a course from start to finish.
- Assists faculty in communicating what they actually teach. May be the first time others learn about specific courses.
- Causes faculty to analyze program/dept. expectations of degree candidates.

Why?

- Will assist the EDL program in communicating expectations for:
- Academic rigor in coursework.
- Candidate exhibition of skills & knowledge.
- Assessment of candidate performances.
- Linkage of assessment to Standards (STATE/ NCATE).

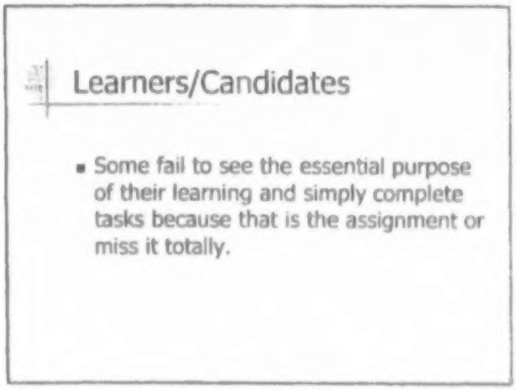
Value to program/department

- The greatest value of mapping comes when university faculty review maps to analyze the triangulation between academic rigor, candidate expectations for training school leaders, and link to standards.



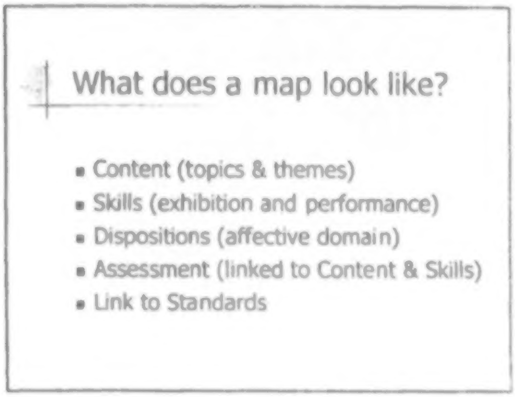
Restructuring Literature

- Critical importance of developing complex problem-solving & higher-order thinking in our candidates.
- How do professors address this issue?
- Requires a re-orientation in content and pedagogy.
- Requires a re-conceptualization of the knowledge & skills we expect our candidates to learn and apply to real-world situations.



Learners/Candidates

- Some fail to see the essential purpose of their learning and simply complete tasks because that is the assignment or miss it totally.



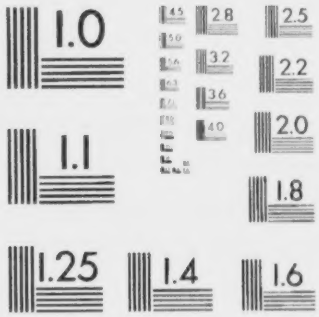
What does a map look like?

- Content (topics & themes)
- Skills (exhibition and performance)
- Dispositions (affective domain)
- Assessment (linked to Content & Skills)
- Link to Standards

AIIM

Association for Information and Image Management

1100 Wayne Avenue, Suite 1100
Silver Spring, Maryland 20910
301/587-8202



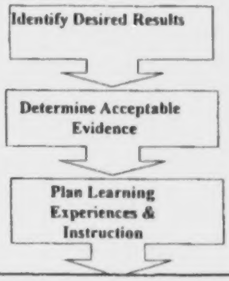
MANUFACTURED TO AIIM STANDARDS
BY APPLIED IMAGE, INC.

Strategies to Begin

- Syllabus-Method 1
- Weekly Sessions
  - Knowledge
  - Skill/Objective
  - Dispositions
  - Assessment/Performance Indicators
  - Standards

Stages of Backward Design

Wiggins & Mc Tighe (1998)

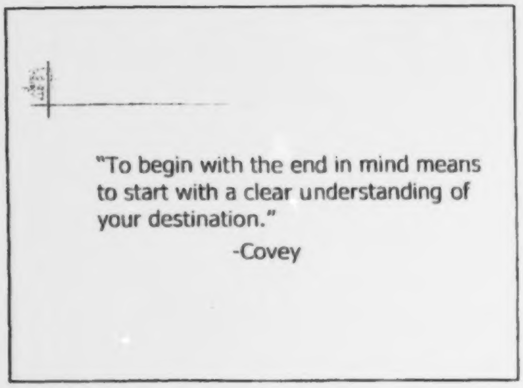

Identify Desired Results

Determine Acceptable Evidence

Plan Learning Experiences & Instruction

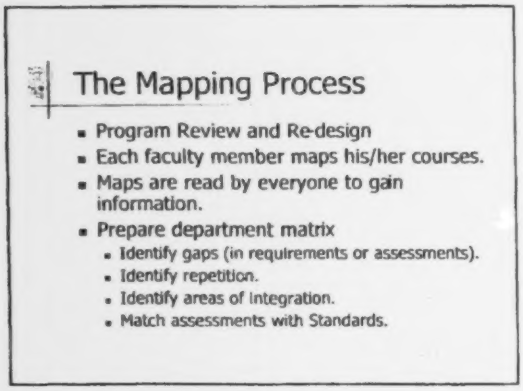
Strategies to Begin

- Syllabus-Method 2
- Semester View-Exit
  - Knowledge
  - Skills/Objectives
  - Disposition
  - Assessment/Performance Indicator
  - Standards



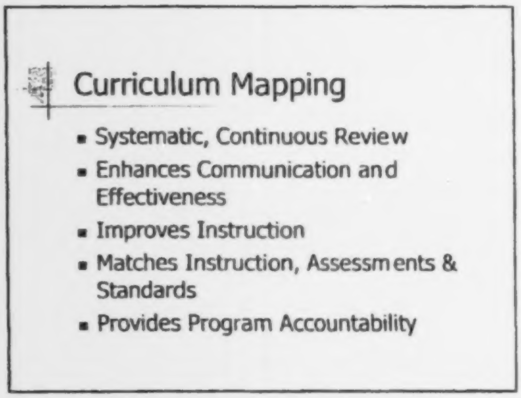
"To begin with the end in mind means to start with a clear understanding of your destination."

-Covey



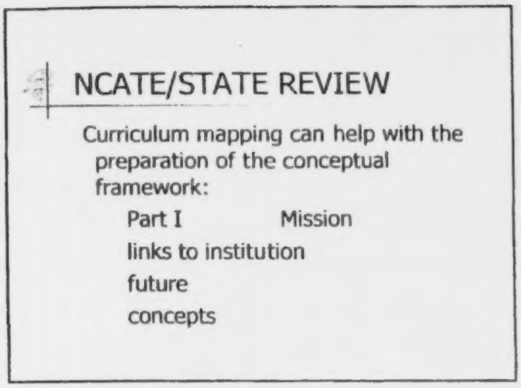
The Mapping Process

- Program Review and Re-design
- Each faculty member maps his/her courses.
- Maps are read by everyone to gain information.
- Prepare department matrix
  - Identify gaps (in requirements or assessments).
  - Identify repetition.
  - Identify areas of integration.
  - Match assessments with Standards.



Curriculum Mapping

- Systematic, Continuous Review
- Enhances Communication and Effectiveness
- Improves Instruction
- Matches Instruction, Assessments & Standards
- Provides Program Accountability



NCATE/STATE REVIEW

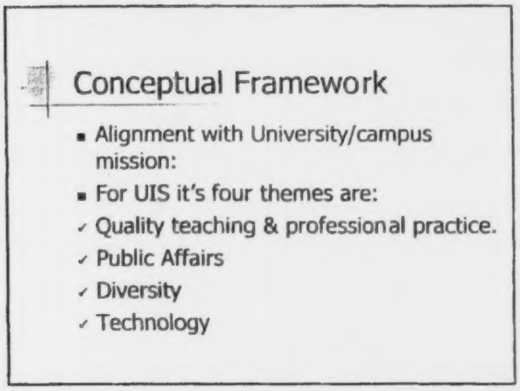
Curriculum mapping can help with the preparation of the conceptual framework:

Part I Mission

links to institution

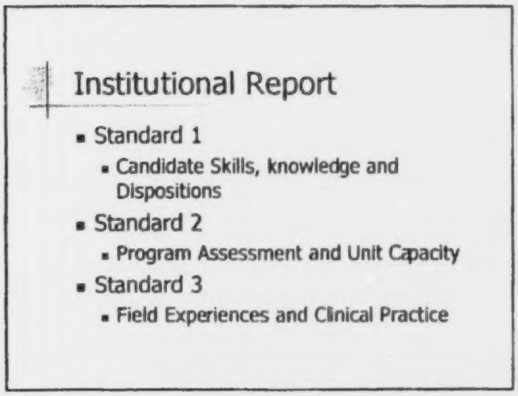
future

concepts



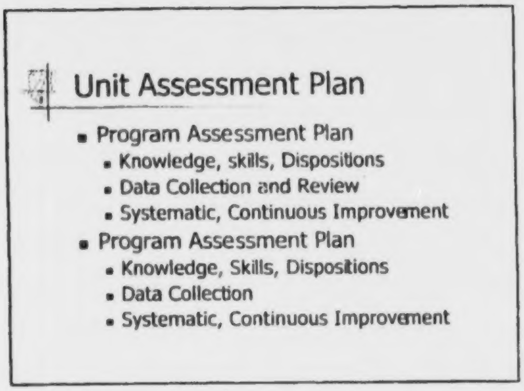
Conceptual Framework

- Alignment with University/campus mission:
- For UIS it's four themes are:
- ✓ Quality teaching & professional practice.
- ✓ Public Affairs
- ✓ Diversity
- ✓ Technology



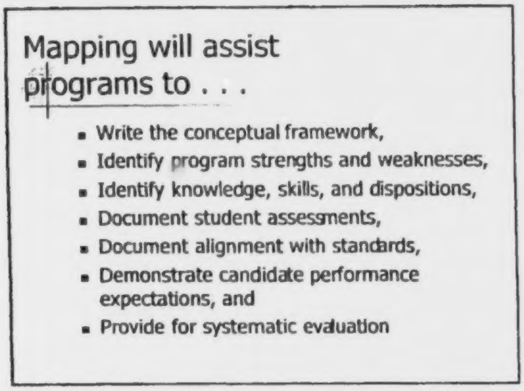
Institutional Report

- Standard 1
  - Candidate Skills, knowledge and Dispositions
- Standard 2
  - Program Assessment and Unit Capacity
- Standard 3
  - Field Experiences and Clinical Practice



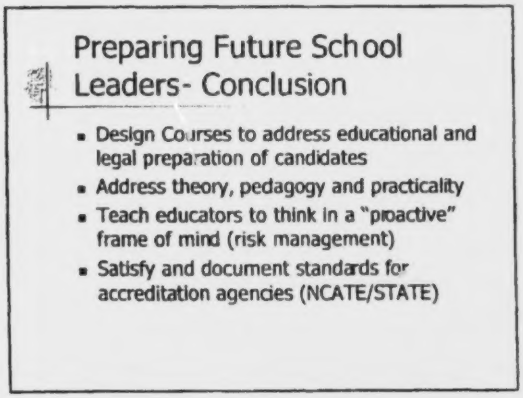
Unit Assessment Plan

- Program Assessment Plan
  - Knowledge, skills, Dispositions
  - Data Collection and Review
  - Systematic, Continuous Improvement
- Program Assessment Plan
  - Knowledge, Skills, Dispositions
  - Data Collection
  - Systematic, Continuous Improvement



Mapping will assist programs to . . .

- Write the conceptual framework,
- Identify program strengths and weaknesses,
- Identify knowledge, skills, and dispositions,
- Document student assessments,
- Document alignment with standards,
- Demonstrate candidate performance expectations, and
- Provide for systematic evaluation



Preparing Future School Leaders- Conclusion

- Design Courses to address educational and legal preparation of candidates
- Address theory, pedagogy and practicality
- Teach educators to think in a "proactive" frame of mind (risk management)
- Satisfy and document standards for accreditation agencies (NCATE/STATE)

UIS Department of Educational Leadership
University of Illinois at Springfield
College of Education and Human Services

EDL 503 School Law
Course# EDL 503
Title: School Law

Conceptual Framework:

Week	Knowledge	Skill	Disposition	Assessment/ Performance Indicator	NCATE Standards	ISBE Standards	ISLLC Standards
1-8	School administrators need to develop an understanding of the constitutional and statutory basis for the underlying legal principles regarding public education.	School administrators need to be able to answer questions from constituents in the educational arena about education. In order to do so, administrators should be able to locate information using the school code. Analyze problem Locate information using table of contents and index Identify which statue section addresses the problem Answer specific questions about education under Illinois law.	School administrators and school law students will develop an appreciation for the historical and practical benefits of our legal heritage: Constitutional, statutory, administrative, and case law foundations of our legal system as it pertains to public education.	Students will answer questions about school problems and regulations by locating the information in the school code. Students will be asked to answer the questions and to identify the specific statute that addresses the issue using proper legal citations.	3.4,2.1, 2.2,2.4, 1.7,1.3, 7.5,4.5, 7.4,1.7, 10.1,10.4 9.1,9.2, 11.1,11.2 11.4,11.5	Knowledge Indicators 3A,3B,3C, 3D,3G,4B, 5C,5D,6A, 6B,6C,6D, 6E,6F,6G, 6H,6I Performance Indicators 1Q,1R,2R, 2Z,3J,3L,3N ,3O,4H,4I, 5E,5F,5J,5K 6J,6K,6L, 6M,6N,5G, 6O,2NN,	5-2,1-1,1-4,2-5,2-10,3-7,6-3, 6-1,6-7, 2-8,1-10, 2-6,3-19, 6-5,5-7, 5-8,4-2
1-4	School leaders should be aware of and know how to research and read relevant legal cases pertaining to public education.	Students will be able to research and identify and analyze the critical components of case law as follows: Identify parties Discuss legal history of case Identify legal issues Discuss court's reasoning Discuss court's decision Identify legal precedence Discuss dissenting opinions	Students should appreciate the legal foundations for public education in Illinois. Students should gain an appreciation and understanding of the importance of legal research.	Students are required to use legal research methodology and technology to locate cases from a list of preferred cases. Students will review and analyze the critical elements of a legal case including the following areas.	3.4,2.1, 2.2,2.4, 1.7,1.3, 7.5,4.5, 7.4,1.7, 10.1,10.4 9.1,9.2, 11.1,11.2 11.4,11.	Knowledge Indicators 3A,3B,3C, 3D,3G,4B, 5C,5D,6A, 6B,6C,6D, 6E,6F,6G, 6H,6I Performance Indicators 1Q,1R,2R, 2Z,3J,3L,3N 3O,4H,4I, 5E,5F,5J,5K 6J,6K,6L, 6M,6N,5G, 6O,2NN,	5-2,1-1,1-4,2-5,2-10,3-7,6-3, 6-1,6-7, 2-8,1-10, 2-6,3-19, 6-5,5-7, 5-8,4-2

Week	Knowledge	Skill	Disposition	Assessment/ Performance Indicator	NCATE Standards	ISBE Standards	ISLLC Standards
1-16	School administrators need to develop an understanding of the constitutional and statutory basis for the underlying legal principles regarding public education. By analyzing educational problems in a legal arena, future educational leaders will be able to apply the fundamental constitutional, statutory, administrative, and case law principles governing education in Illinois.	Future school administrators need to be able to solve educational problems by applying legal and ethical principles of educational leadership. Skills: Analyze problem Identify relevant legal issues: Constitutional, statutory, administrative, case law Cite legal authority which addresses the problem Apply legal reasoning to address the issues presented by the hypothetical situation Answer specific questions about education under Illinois law	School administrators and school law students will develop an appreciation for the historical and practical benefits of our legal heritage; constitutional, statutory, administrative, and case law foundations of our legal system as it pertains to public education.	Midterm and Semester Exams Students will be given hypothetical school situations similar to those faced by school administrators on a daily basis. These situations provide opportunities for students to identify the legal and ethical issues, cite the appropriate legal authority, apply the corresponding legal principles, and determine the appropriate response	3.4,2.1, 2.2,2.4, 1.7,1.3, 7.5,4.5, 7.4,1.7, 10.1,10.4 9.1,9.2, 11.1,11.2 11.4,11.	Knowledge Indicators 3A,3B,3C, 3D,3G,4B, 5C,5D,6A, 6B,6C,6D, 6E,6F,6G, 6H,6I Performance Indicators 1Q,1R,2R, 2Z,3J,3L,3N 3O,4H,4I, 5E,5F,5J,5K 6J,6K,6L, 6M,6N,5G, 6O,2NN,	5-2,1-1,1-4,2-5,2-10,3-7,6-3, 6-1,6-7, 2-8,1-10, 2-6,3-19, 6-5,5-7, 5-8,4-2
10-14	School administrators need to develop an understanding of the constitutional and statutory basis for the underlying legal principles regarding public education. Students need to be able to apply these concepts in the local school setting	School administrators need to be able to address issues in the educational arena about education law. In order to do so, administrators should be able to prepare school policies and procedures at the local level through the use of student handbooks.	School administrators and school law students will develop an appreciation for the historical and practical benefits of our legal heritage; constitutional, statutory, administrative, and case law foundations of our legal system as it pertains to public education. Students will also develop an appreciation for the application of these important legal principles to day to day school operations.	Students will prepare a written analysis of the role of student handbooks as a legal and public relations document for schools. Students will compare and contrast the handbooks from 2 districts. One of the handbooks will be from the student's school. Students will identify the strengths and weaknesses of each of the handbooks and will make recommendations for improvement.	3.4,2.1, 2.2,2.4, 1.7,1.3, 7.5,4.5, 7.4,1.7, 10.1,10.4 9.1,9.2, 11.1,11.2 11.4,11.	Knowledge Indicators 3A,3B,3C, 3D,3G,4B, 5C,5D,6A, 6B,6C,6D, 6E,6F,6G, 6H,6I Performance Indicators 1Q,1R,2R, 2Z,3J,3L,3N 3O,4H,4I, 5E,5F,5J,5K 6J,6K,6L, 6M,6N,5G, 6O,2NN,	5-2,1-1,1-4,2-5,2-10,3-7,6-3, 6-1,6-7, 2-8,1-10, 2-6,3-19, 6-5,5-7, 5-8,4-2

Education Law Association
48th Annual Conference
New Orleans, Louisiana
November 15, 2002

Session Outline

ACCOUNTABILITY AND EDUCATIONAL MALPRACTICE: A NEW HIGH STAKES TEST?

Todd A. DeMitchell
Professor and Chair
Department of Education
University of New Hampshire
Durham, New Hampshire

The public's desire to hold the public schools accountability is pervasive. "The formulation of standards and the measurement of performance [are] intended to tidy up a messy system and to make teachers and school administrators truly accountable."[1] Nearly all states have instituted some form of an accountability mechanism. "The emergence of state-level, performance-based accountability systems is a predictable consequence of the standards and assessment movements in education."[2] W. James Popham, a recognized testing expert from UCLA, describes educational accountability's key feature as the installation of state-mandated testing.[3] The purpose of this testing was clear, he writes. Legislators did not believe that public school educators were doing their job effectively. The citizenry was doubtful after hearing a litany of school failures that its tax dollars were being well spent on the schools.[4]

As pervasive as accountability is, it remains a conundrum for public education. Policy makers want to be seen as supporting accountability and high standards for students and educators. If the student does not measure up according to a high-stakes test,[5] then fail the student; no social promotions allowed. If the school is labeled as failing, allow the students to escape to another school,[6] fire the principal, or reconstitute the school. If the school district is failing, place it in receivership. Accountability in education increasingly means that if a prescribed standard is not met then a consequence must follow. Can educational malpractice, which increases the stakes of instruction and assessment, be far behind this wave of accountability?

When standards are formulated for teaching and learning, expectations for practice are articulated. Professionals, such as physicians and attorneys,[7] are held individually accountable through malpractice suits when their professional actions fail to conform to accepted practices and an injury occurs. To date, malpractice in education has failed as a theory of recovery.[8] Currently, educators are not required, as other professionals are required, to perform their duties in accordance with the standard of care observed by their profession. An educator may be disciplined, even dismissed, for incompetence. But, a student who is injured due to an inadequate education has no legal recourse in a suit for damages.[9] However, a sea change may be occurring in California, the state that first held that educational malpractice is not a viable tort, in which educators may be held liable for the performance of their professional activities. We have standards for students to meet and standards for curriculum. We are developing sets of standards for teaching through the National Board for Professional Teaching Standards and interstate compacts. Is it time to revisit the issue of educational malpractice in light of systemic reform efforts?[10]

The discussion will be in five parts. Part 1 will explore what it means to be a professional. Part II will discuss negligence, the legal theory upon which educational malpractice is grounded. Part III will review the seminal California case of *Peter W. v. San Francisco Unified School District.*[11] The next section, Part IV, entitled "Opening the Floodgates? will discuss *California Teachers Association v. Davis.*[12] This case challenged the implementation of California Proposition 227, *English Language in Public Schools.*[13] And, the last section will attempt to draw a conclusion about the future of educational malpractice.

---

[1] [1] Elliot W. Eisner. *What Does It Mean to Say a School Is Doing Well*? PHI DELTA KAPPAN 82: 367 (2001).

[2] Casey D. Cobb. PERFORMANCE-BASED ACCOUNTABILITY SYSTEMS FOR PUBLIC EDUCATION. New Hampshire Center for Public Policy Studies 4 (February 21, 2002). In addition, federal law, *No Child Left Behind*, requires that schools notify students if the school is labeled as failing so that the students may choose to attend another school.

[3] For a discussion of of the purposes, benefits, and arguments of high stakes testing, see *Assessment—High Stakes/Competency Testing*, www.ecs.org/html/issue.asp.

[4] [4] W. James Popham. MODERN EDUCATIONAL MEASUREMENT: PRACTICAL GUIDELINES FOR EDUCATIONAL LEADERS (2000).

[5] For a discussion of high-stakes testing and due process, see Wiliam P. Quigley. *Due Process Rights of Grade School Students Subjected to High-Stakes Testing,* 10 B.U. PUB. INT. L.J. 284 (2001).

[6] *See,* Zelman v. Simmons-Harris, 122 S.Ct 2460 (2002) in which students from low-income families are allowed to leave the public school for a private and to have their choice supported through public funds.

[7] See, Michael J. Polelle, *Who's on First, and What's a Professional*, 33 U.S.F.L. REV. 205, 206 (1999). ("Judicial intervention in the specific professions of medicine and law has largely molded the malpractice law applied to all professionals.").

---

[8] *See*, Ross v. Creighton University, 740 F.Supp. 1319, 1327 (N.D. Ill. 1990) ("Educational malpractice is a tort theory beloved of commentators, but not of courts.") and Livosi v. Hicksville Union-Free School Dist., 693 N.Y.S.2d 617, 617-618 (1999) (As a matter of public policy, such a cause of action cannot be entertained by courts of this State.").

[9] Michael Smoker, RESULTS: THE KEY TO CONTINUOUS SCHOOL IMPROVEMENT, 8 (1996) ("A report on education and the economy indicates that educational attainment is the single most determinant of a person's success in the labor market. The 50 years it has been tracked, the payoff to schooling has never been higher.").

[10] Terri A. DeMitchell, *Educational Malpractice: Will School Reform Efforts Make It Possible?* In Todd A. DeMitchell and Richard Fossey THE LIMITS OF LAW-BASED SCHOOL REFORM: VAIN HOPES AND FALSE PROMISES 63-74 (1997).

[11] 60 Cal.App. 3rd 817 (Ct.App. 1976).

[12] 64 F.Supp.2d 945 (C.D. 1999).

[13] CA. EDUC CODE §310, et seq.

Due Process and Student Portfolio Assessment in an Era of High-Stakes Testing

Kevin P. Brady
Assistant Professor, The City University of New York (CUNY), Queens College

Education Law Association's 48th Annual Conference
New Orleans, Louisiana

ABSTRACT

This presentation critically examines some potential legal concerns associated with student due process issues raised by student portfolio assessment practices. Similar to high-stakes standardized testing, students possess legally recognized property and liberty interests in academic matters that raise due process protection considerations in testing. Specifically, Quigley (2001) indicates that students possess four primary due process rights as it relates to high-stakes standardized testing. These four student due process rights include:

(1.) The right to expect that the test is an accurate and appropriately utilized evaluation tool;
(2.) The right to be solely tested on the material that has been taught;
(3.) The right to expect that both the test and the student's level of preparation meet "professionally acceptable standards";
(4.) The state must prove that students have been both fairly and adequately prepared to take the test and be given a fair opportunity to pass the test.

Despite a disproportionate focus upon high-stakes standardized testing in schools across the country, the development of student portfolios for student assessment purposes began to supplement high-stakes tests as a student assessment measure of academic skills and a tool to facilitate educational instructional decision-making beginning in the late 1980's (Penta, 2002). While debates concerning the comparative effectiveness of student assessment practices, such as high-stakes standardized testing versus student portfolios are encouraged, educators must recognize a "minimum" threshold of student due process necessary for academic assessment practices. This presentation will focus on the unique

due process concerns raised by student portfolio assessment, a contemporary alternative to high-stakes testing.

INTRODUCTION

Student portfolio assessment is defined as the collection of student work that represents a selection of a student's academic performance. The student portfolio model is derived from the visual and performing arts tradition whereby portfolios were used to showcase a student's best works as well as provide student feedback as to the relative strengths and weaknesses of the student's portfolio. A call for greater teacher involvement in both designing curriculum and assessing students has also been an impetus for increased student portfolio use in schools across the country. As a student assessment tool, student portfolios have been encouraged because they can be fully integrated into the curriculum as a measure of classroom-based performance (Sweet, 1993). Additionally, one of the benefits of student portfolios is that they supplement rather than take time away from classroom instruction (Sweet, 1993). Based on some of these particular benefits of student portfolios as a student assessment measure, some educators and researchers contend that student portfolio assessment is more effective compared to standardized testing in measuring student academic skills.

However, beginning in the late 1990's, research focus and attention deviated away from student portfolio assessment as well as other alternative student assessment practices and in the direction of high-stakes standardized testing (Penta, 2002). For example, many state legislatures incorporate their annual student multiple-choice testing programs into "accountability systems" that implement school-level sanctions or incentives based upon student test results. Consequently, high-stakes standardized testing in currently well established in the areas of high school exit exams and determining student promotion and retention outcomes for grades K thru 12. (Quigley, 2001).

Clearly, the development of student portfolios in the current era of high-stakes testing emphasizing standards and providing fiscal incentives to teachers based on schools' multiple-choice test scores is increasingly difficult. Moreover, it seems that the era of high-stakes accountability systems shows not signs of leaving the U.S. public educational assessment landscape.

STATEMENT OF THE PROBLEM: STUDENT DUE PROCESS AMBIGUITIES AND ASSESSMENT

A significant misconception by educators, especially school administrators, in the context of student due process rights is that the courts determined procedural due process only in the school area of disciplinary proceedings but not in "academic decision" areas. Two Supreme Court decisions, most notably, *University of Missouri v. Horowitz* (435 U.S. 78, 1978) and *University of Michigan v. Ewing* (474 U.S. 214, 1985) have specifically held that students have liberty and property interests sufficient to initiate due process protections in the "academic arena." Courts recognize that students have due process rights in the "academic arena," which would include issues surrounding student assessment. Additionally, appellate courts in the First, Second, Third, Fifth, Sixth, Eighth and Tenth Circuits and other district courts have proceeded with the assumption that students possess protected due process rights in academically related areas (Quigley, 2001).

The Supreme Court has noted that the Due Process Clause of the Fourteenth Amendment has two distinct components: procedural and substantive. Procedural due process requires that the state, at a minimum, provide notice and the opportunity to be heard before it deprives citizens of certain state-created protected interests, including public education. Procedural due process legal challenges evaluate the fairness of the method by which state action was achieved (Quigley, 2001). Substantive due process, on the other hand, indicates that there are some rights that are so fundamental to the American legal system that even if procedural due process considerations are satisfied, an examination of the fairness of the state action itself, not only the method, needs to be examined.

Unfortunately, the Supreme Court's guidelines for both procedural and substantive due process in the context of student assessment issues have and continue to be unclear. While the Court in *Horowitz* and *Ewing* have been explicit regarding the notion that students have both property and liberty rights necessary to initiate due process rights in the "academic arena " of public schools and colleges/universities, the Court was not clear in those decisions as what are the requirements for satisfying procedural and substantive due process. Fortunately, there do exist some principles aimed at guiding the due process analysis for student assessment issues. The four core student due process rights include:

(1.) A student's right to a fair test;
(2.) A student's right to be adequately prepared for that test material by their teacher;
(3.) The student's right that the test itself, including the way the test is being used, and the adequacy of their preparation will satisfy both professional and academic standards;
(4.) The student's right to require the state to prove that the students are prepared to have a fair chance to pass the test(s).

Given the inherently flexible nature of student portfolios, this presentation will critically examine whether core student due process concerns need to be implemented more broadly or narrowly in comparison to those associated with high-stakes standardized testing. Despite a current emphasis on high-stakes standardized testing, potential student due process issues related to the specific domain of student portfolio assessment provides helpful guidance for educators providing student assessment based on student portfolios on either a small or large scale in their schools.

REFERENCES

Birrell, R.B. & Ross, S.K. (Summer 1996). Standardized Testing and Portfolio Assessment: Rethinking the Debate. *Reading Research and Instruction,* 35, 285-97.

Hebert, E. (1998). Lessons Learned About Student Portfolios, *Phi Delta Kappan*, Vol. 79 No. 8, 583-588.

Jones, B. (2001). Using Student Portfolios Effectively, *Intervention in School and Clinic,* Vol. 36, No. 4, March 2001, 225-229.

Moran, R.F. (2000). Sorting and Reforming: High-Stakes Testing in the Public Schools, *Akron Law Review,* 34, 107.

Quigley, W.P. (2001). Due Process Rights of Grade School Students Subjected to High-Stakes Testing. *The Boston Public Interest Law Journal, 10,* 284 (Spring 2001).

Penta, M.Q. (2002). Student Portfolios in a Standardized World. *Kappa Delta Pi Record*, Winter 2002, 77-81.

Sweet, D. (1993). *Student Portfolios: Classroom Uses.* U.S. Department of Education: Office of Educational Research and Improvement (OERI).

University of Michigan v. Ewing, 474 U.S. 214 (1985).

University of Missouri v. Horowitz, 435 U.S. 78 (1978).

Balancing Human Rights and Civil Liberties in An Emerging Democracy:

Education Law, Policy and Practice in South Africa

Johan Beckmann
Department of Education Management & Policy Studies
University of Pretoria
Pretoria, South Africa

Simeon Maile
Department of Education Management & Policy Studies
University of Pretoria
Pretoria, South Africa

Willie van Vollenhoven
Department of Education Management & Policy Studies
University of Pretoria
Pretoria, South Africa

Rika Joubert
Department of Education Management & Policy Studies
University of Pretoria
Pretoria, South Africa

Presented At:
Education Law Association
48th Annual Conference
New Orleans, LA
November 14-16, 2002

OUTLINE

BALANCING FUNDAMENTAL HUMAN RIGHTS AND CIVIL LIBERTIES IN AN EMERGING DEMOCRACY: EDUCATION LAW, POLICY AND PRACTICE IN SOUTH AFRICA

Paper to be read at the 48th annual conference of ELA, New Orleans, November 2002 - Johan Beckmann (A), Simeon Maile (B), Willie van Vollenhoven (C) and Rika Joubert (D) (University of Pretoria, South Africa)

INTRODUCTION

It is an over-used and under-appreciated tired expression that South Africa experienced a miracle in 1994 when a bloodless coup saw the installation of the country's first truly democratically-elected government, the commencement of its so-called interim Constitution[1] and the Rainbow Nation[2] came into being. Like the next version of the Constitution (also called the final Constitution)[3], the interim Constitution contained a Bill of Rights (Chapter 3)[4] which entrenched a number of fundamental rights such as the rights to equality; life; education; privacy; freedom of belief; religion and opinion; freedom of expression and certain labour rights.

The Postamble of the interim Constitution describes this version of the Constitution as a "...a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex". The future to which the interim Constitution provides a bridge is defined in terms of the pursuit of and adherence to certain founding values in the final Constitution:

> South Africa is a democratic state founded on the following values:[5]
>
> (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms
>
> (b) Non-racialism and non-sexism.
>
> (c) Supremacy of the Constitution and the rule of law.
>
> (d) Universal adult suffrage, a national common voters roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness.

---

[1] Act 200 of 1993.

[2] A phrase used by the first President of the new dispensation, Mr Nelson Mandela, in his first address to the nation after his installation on 27 April 1994.

[3] Act 108 of 1996.

[4] Chapter 2 of the final Constitution.

[5] Section 1.

Using some poetic licence, one might say that the other side of the bridge, for South Africans, implies "...the full and equal enjoyment of all rights and freedoms"[6] guaranteed by the Constitution. Until and unless all South Africans arrive on the other side of the bridge there will be tensions between the rights and freedoms to which people aspire and the quality of enjoyment of rights that they have real and practical access to. This paper will explore some of these tensions regarding: A) equality and non-discrimination on the basis or race, age and disability; B) labour rights; C) freedom of expression and D) religious rights.

The discussion will take cognisance of three important provisions of the final Constitution in this regard:

- The founding values enunciated in section 1
- The provision in section 7(2) that the "state must respect, protect, promote and fulfil the rights in the Bill of Rights."
- The provisions in sections 8(10 and (2) that:
  - (1) The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state.
  - (2) A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.

An attempt will be made to indicate if and to what to what extent progress has been made to resolve possible tensions in regard to the rights listed above. In the discussion reference will be made to law, policy and practice.

A RACE, AGE AND DISABILITY

Constitutional and statutory provisions

The final Constitution of the Republic of South Africa, Act No 108 of 1996 (hereinafter CRSA)

Section 9 (the equality provision) of CRSA is a crucial provision on race, age and disability in South African law. It provides as follows:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken.

(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.

---

[6] Section 9(2) of the final Constitution.

(4) No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.

(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair.

One can infer that, in terms of CRSA, equality means that:

- The equal worth of people is protected by the right to equality[7]
- Everyone has the right to equal protection and benefit of the law
- Everyone has the right not to be discriminated against unfairly (directly or indirectly) by the state on a number of listed and analogous grounds
- Everyone has the right not to be discriminated against unfairly by any person on a number of listed and analogous grounds.[8] De Groof & Lauwers[9] aver that "[O]nly objective, sensibly and reasonably different treatment is permitted.
- People who have been discriminated against previously have the right to be treated differently by legislative and other measures in order to advance or protect them (section 9(3)). This provision refers to what is commonly known as affirmative action.
- Everyone has a right to free and full and equal enjoyment of all rights and freedoms
- Race, age and disability are specifically mentioned as grounds on the basis of which there may be no unfair discrimination against anyone.

Section 29 of CRSA protects everybody against discrimination in the field of education.[10] It provides as follows:

(1) Everyone[11] has the right-

(a) to a basic education[12], including adult basic education; and

---

[7] Malherbe, EFJ. 2001. Human rights in education (Draft of a chapter of a book to be published in 2003), p 35.

[8] Malherbe (*Ibid*) comments that the provision recognises that people may be treated differently for very valid reasons and therefore does not prohibit all discrimination, but only unfair discrimination. He also says that the Constitutional Court has defined discrimination as unequal treatment that impairs human dignity, or affects a person in a comparably serious manner.

[9] De Groof, Jan & Lauwers, Gracienne. 2001. Education policy and law: The politics of multiculturalism in education. **Perspectives in Education**, 19(4):47 - 63. Also see in general about equality Malherbe, EFJ. 2002. Advancing social change: Recent human rights developments in South Africa. Paper read at the Oxford Round Table on Civil Rights / Human Rights, 11- 16 August 2002, Oxford, pp. 6 – 14.

[10] It goes without saying that the drafters of CRSA had access to and used the various international human rights instruments relevant to education.

[11] This word rules out unfair discrimination on the basis of race, disability and age.

(b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

(2) Everyone has the right to receive education in the official language or languages of their choice in public educational institutions where that education is reasonably practicable. In order to ensure the effective access to, and implementation of, this right, the state must consider all reasonable educational alternatives, including single medium institutions, taking into account-

(a) equity;
(b) practicability; and
(c) the need to redress the results of past racially discriminatory laws and practices.

Section 29(3) of CRSA provides for the establishment of private (independent) educational institutions and provides yet another safeguard against unfair discrimination on the basis of race:

(3) Everyone has the right to establish and maintain, at their own expense, independent educational institutions that-

(a) do not discriminate on the basis of race ...[13]

Promotion of Equality Act, No 4 of 2000 (hereinafter Equality Act)

The Equality Act deals entirely with the promotion of equality.[14] The objects of this Act include the following:

---

[12] Malherbe *op cit* p 26 comments on the fact that this section, unlike section 32 of the Interim Constitution, does not include a right to equal access to educational institutions. He believes that such a provision is unnecessary as section 9 (the equality clause) provides adequate protection in this regard. Malherbe also comments that this section does not guarantee absolute equality but educational opportunities in accordance with a person's abilities. He believes that reasonable and justifiable admission requirements based on performance, language and other requirements may be imposed.

[13] Malherbe, *op cit*, p 28 contends that this section clarifies many uncertainties of the Interim Constitution. The limitations of the grounds on which such institutions (including higher education institutions) can be established have now been removed. Such institutions may be established on reasonable grounds and for reasonable purposes provided that certain conditions that are specified are met.

[14] The Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000. The long title of this Act provides that its aim is to give effect to section 9 (the equality clause) read with item 23 (1) of Schedule 6 to the Constitution of the Republic of South Africa, 1996, so as to prevent and prohibit unfair discrimination and harassment; to promote equality and eliminate unfair discrimination; to prevent and prohibit hate speech; and to provide for matters connected therewith. The said item 23(1) reads that national legislation envisaged in sections 9 (4), 32 (2) and 33 (3) of the new Constitution

(a) to enact legislation required by section 9 of the Constitution [the "equality clause"];

(b) to give effect to the letter and spirit of the Constitution, in particular-

...

  (iii) the values of non-racialism and non-sexism contained in section 1 of the Constitution;

  (iv) the prevention of unfair discrimination and protection of human dignity as contemplated in sections 9 and 10 of the Constitution;

...

(d) to provide for measures to facilitate the eradication of unfair discrimination, hate speech and harassment, particularly on the grounds of race, gender and disability;

(e) to provide for procedures for the determination of circumstances under which discrimination is unfair;

(f) ...

(g) to provide remedies[15] for victims of unfair discrimination, hate speech and harassment and persons whose right to equality has been infringed;

(h) to set out measures to advance persons disadvantaged by unfair discrimination.

The South African Schools Act, 84 of 1996 (hereinafter SASA)

The preamble of SASA states, among others, that this Act is enacted because South Africa requires a new national system for schools which will redress past injustices in educational provision, ... combat racism and sexism and all other forms of unfair discrimination and intolerance ...Section 6(3) of SASA provides that no form of racial discrimination may be practised in implementing policy determined under this section [language policy].

The Employment Equity Act, 55 of 1998 (hereinafter Equity Act)

Equity Act

The Employment Equity Act, 55 of 1998, in its preamble, recognises that as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market [including education]; and that those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws. The preamble declares that this Act is enacted among others to:

- promote the constitutional right of equality and the exercise of true democracy;
- eliminate unfair discrimination in employment;
- ensure the implementation of employment equity to redress the effects of discrimination.

---

must be enacted within three years of the date on which the new Constitution took effect. The commencement date of CRSA is 4 February 1997.

[15] *E.g.* an order for the payment of damages arising out of unfair discrimination.

According to section 2 of the Equity Act the purpose of this Act is to achieve equity in the workplace by:

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination; and

(b) implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups, in order to ensure their equitable representation in all occupational categories and levels in the workforce.

Section 5 of the Equity Act provides that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Section 6 prohibits unfair discrimination in the workplace and provides that:

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.

(2) It is not unfair discrimination to-

  (a) take affirmative action measures consistent with the purpose of this Act; or

  (b) distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

Section 13 of this Act touches on affirmative action and provides that certain categories of employers ("designated employers") must, in order to achieve employment equity, implement affirmative action measures for people from designated groups in terms of this Act. In terms of section 1 of the Act "designated employer" includes an organ of state as defined in section 239 of the Constitution [including national and provincial education departments].

Section 15 deals with affirmative action measures and provides that:

(1) Affirmative action measures are measures designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer.

(2) Affirmative action measures implemented by a designated employer must include-

  (a) measures to identify and eliminate employment barriers, including unfair discrimination, which adversely affect people from designated groups;

  (b) measures designed to further diversity in the workplace based on equal dignity and respect of all people;

  (c) making reasonable accommodation for people from designated groups in order to ensure that they enjoy equal opportunities and are equitably represented in the workforce of a designated employer;

  d) subject to subsection (3), measures to-

(i) ensure the equitable representation of suitably qualified people from designated groups in all occupational categories and levels in the workforce; and

(ii) retain and develop people from designated groups and to implement appropriate training measures, including measures in terms of an Act of Parliament providing for skills development.

(3) The measures referred to in subsection (2) (d) include preferential treatment and numerical goals, but exclude quotas.

The National Education Policy Act, 27 of 1996 (hereinafter NEPA)

Section 3(1) of this Act provides that the Minister of Education shall determine national education policy in accordance with the provisions of the Constitution and this Act. Section 4 lists directive principles of national education policy and provides that:

The policy contemplated in section 3 shall be directed toward:

(a) the advancement and protection of the fundamental rights of every person guaranteed in terms of Chapter 2 of the Constitution, and in terms of international conventions ratified by Parliament, and in particular the right-

    (i) of every person to be protected against unfair discrimination within or by an education department or education institution on any ground whatsoever;

    ...

(c) achieving equitable education opportunities and the redress of past inequality in education provision, including the promotion of gender equality and the advancement of the status of women.

Discussion of tensions

Race

Malherbe[16] discusses section 29(2) of CRSA and points out that:

"This was the clause that nearly derailed the constitutional negotiations of the nineties and on which an uncomfortable compromise was reached. The essence of the crisis was that some parties tried to protect the existing separate schools for the different language groups by means of a constitutional right to single-medium schools, as opposed to the ANC's ideal of equal, non-racial education that would eradicate the injustices and disparities of the past. On the one hand, ... there was the fear that existing white schools would be overcrowded by pupils from other language and cultural groups. On the other hand, there was the suspicion that this fear was inspired by racism, and that a right to single-medium institutions would perpetuate existing inequalities and would frustrate the redress of inequalities and the transformation of the education system".

---

[16] Op *cit*, pp 26 – 27.

Section 29(2) therefore reflects some tension and represents a compromise between individuals' rights to choose a language of education and the need to guard against unfair discrimination.

Admission policy for ordinary public schools[17]

This policy was promulgated in terms of section 3(4)(i) of NEPA and contains the following relevant items:

- The admission policy of a public school and the administration of admissions by an education department must not in any way unfairly discriminate against an applicant for admission (item 8)[18].
- The governing body of a public school may not administer any test[19] related to the admission of a learner to a public school, or direct or authorise the principal of the school or any other person to administer such test (item 11).

Norms and standards for language policy in public schools[20]

Item IVA (2) of this policy comments on the fact that the inherited language-in-education policy in South Africa has been underpinned by racial and linguistic discrimination. Such policies have affected the access of learners to the system or their performance within it.

The policy (Item IVA(3)) says that the new policy is conceived of as an integral apart of the strategy to build a non-racial nation in South Africa. It is intended to help create an environment in which respect for languages other than one's own will be fostered.

National norms and standards for school funding (Norms and Standards)[21]

Items 39 and 40 of the Norms and Standards state that effecting redress and equity in school funding, with a view to progressively improving the quality of school education, within a framework of greater efficiency in organizing and providing education services, are matters of urgent priority for the Ministry of Education. The documents observes that, to achieve these objectives [the objectives stated in the

---

[17] General Notice 2432 (Government Gazette 19377) of 19 October 1998.

[18] See section 9(3-4) of CSRA.

[19] This term is aimed at eliminating indirect unfair discrimination, e.g. where schools ostensibly test learners' proficiency in English or Afrikaans but the hidden aim is to exclude Black children. However, this item does not exclude the possibility of the provincial education department asking candidates for admission to undertake suitable tests with a view to placement e.g. in music schools

[20] Government Notice R1738 (Government Gazette 18546) of 19 December 1997.

[21] General Notice 2362 of 1998 (Government Gazette Vol. 400, No. 19347) of 12 October 1998

SASA preamble] in a systematic manner, requires new systems of budgeting and spending for schools.

Items 46 to 48 discuss the effect of existing official funding policies (1998). They comment that, ironically, given the emphasis on redress and equity, the funding provisions of the Act (SASA) appear to have worked to the advantage of public schools patronised by middle-class and wealthy parents [predominantly white]. The apartheid regime favoured such communities with high-quality facilities, equipment and resources. Vigorous fund-raising by parent bodies, including commercial sponsorships and fee income, have enabled many such schools to add to their facilities, equipment and learning resources, and expand their range of cultural and sporting activities. Since 1995, when such schools had been required to down-size their staff establishments, many had been able to recruit additional staff on governing body contracts, paid from the school fund. ... All too many schools in poor rural and urban working-class communities still suffered the legacy of large classes, deplorable physical conditions, and absence of learning resources, despite a major RDP [Reconstruction and Development Programme,[22] a National School Building Programme, and many other projects paid directly from provincial budgets. Yet the educators and learners in poor schools were expected to achieve the same levels of reaming and teaching as their compatriots.

The Norms and Standards point out that such contradictions within the same public school system reflect past discriminatory investment in schooling, and vast current disparities in the personal income of parents. Therefore the document [the Norms and Standards] addresses these inequalities by establishing a sharply progressive state funding policy for ordinary public schools, which favours poor communities.

Item 99 deals with a "resource targeting list" which will comprise all ordinary public schools in a specific province sorted by "need" or "poverty". Two equally weighted factors will be used to rank the schools:

A The physical condition, facilities and crowding of the school. This factor is weighted 50%.

B The relative poverty of the community around the school. This factor is weighted 50%.

Allocations will be made on a variable per learner basis that favours the poorer segments of the population. The neediest and largest schools will get priority in funding. The results of the application list will, to a large extent, benefit Black learners.

Case law

There have not been many court cases regarding race and education. Two cases stand out.

---

[22] A government initiative which has apparently been discontinued and which did not meet with a great deal of success.

Matukane and Others v Laerskool Potgietersrus 1996 (3) SA 223 (T)

The, who were black persons, had at the beginning of 1996 applied to have their children enrolled at the respondent primary school (a state-aided public school as defined in the Northern Province School Education Act 9 of 1995), but their applications had been refused. The second and third applicants had made similar unsuccessful attempts at the beginning of 1995. The reason given for the refusal to admit the applicants' children was that the school was full. The school was an Afrikaans and English parallel-medium school, although the majority of pupils were Afrikaans-speaking.
Contending that the applicants' children had been refused admission on racial grounds in violation of s 8(2) of the Northern Province School Education Act and ss 8(2), 10, 24(a) and 32(a) of the Constitution of the Republic of South Africa Act 200 of 1993)the Interim Constitution), the applicants (the Member of the Executive Council of the Northern Province for Education, Arts, Culture and Sport being the fourth applicant) applied for an order declaring that the respondent might not, on grounds related to race, ethnic or social origin, culture, colour or language, refuse to admit any child; interdicting the respondent from refusing to admit any child on such grounds; and directing the respondent to admit the black children of the parents listed in an annexure to the notice of motion.

The Court found that the facts *prima facie* proved discrimination. The court held that the respondent could only escape the consequences of that finding if it established that discrimination did not exist or that such discrimination as did exist was not unfair (s 8(4) of the Constitution): it did not matter which of the forms of discrimination mentioned in s 8(2) of the Constitution was proved - should it be found that the applicants had failed to prove discrimination on purely racial grounds, the established facts undoubtedly proved discrimination on the grounds of ethnic or social origin, culture and language.

For the respondent it was contended, firstly, relying on ss 17, 31 and 32(c) of the Constitution read in the light of international law in regard to minority groups in a country, that discrimination on the grounds of ethnic or social origin, culture or language was not *per se* unfair. It was contended, secondly, relying on s 31(1) of the Educational Affairs Act (House of Assembly) 70 of 1988 and the regulations promulgated thereunder that the admission of children to the school was a matter in the control of the governing body and that the school's criteria for admission could only be amended in consultation with the school's parent community.

The court also held that the respondent had failed to establish that there was no unfair discrimination against black children: even if their applications for admission had been rejected because they had elected to receive their schooling through the medium of English, it would still constitute unfair discrimination. The court therefore granted the application.

Motala v University of Natal 1995 (3) BCLR 374 D

Malherbe[xxxix] discusses this case in the context of section 9(2) of CRSA that provides that, to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken. The corresponding provision in the Interim Constitution was the subject of a dispute in **Motala v University of Natal**.[xl]

In this case, an exemplary Indian student was refused admission into medical school in favour of a less meritorious African student in terms of an admission policy which limited the number of Indian students in order to make room for more African students. The court upheld the exclusion of the Indian student simply because it came to the conclusion that Africans were disadvantaged more than Indians under apartheid. This case established the precedent that some people could have been more disadvantaged than others in the disadvantaged group – in this case Black people were held to have been disadvantaged more than Indian people.

Practical issues

Reports on research reports and newspaper reports indicate quite clearly that the tension between the prohibition of unfair discrimination and what happens in practice is still strong.

Newspapers reported on incidents such as the following:

- White learners attacking Black learners (Bryanston: **The Star** 26 June 2000)
- A Black learner stabbing a White learner with a pair of scissors (Vryburg: **The Star** 18 October 2000 and **Beeld** 10 March, 13 May and 20 August 1999)
- Fighting between Black and White learners (Groblersdal: **The Star** 25 March 1999 and **Beeld** 21 January 2000)
- White parents sjambokking Black learners trying to keep them out of a school (Vryburg: **The Star** 18 October 2000 and **Beeld** 10 March, 13 May and 20 August 1999)
- School hostels which have either a majority of White or Black learners have been termed racist (Sabie: **Beeld** 4 August 2001)
- The level at which school fees were pegged was said to be aimed at barring Black learners from a school (Meyerton: **Beeld** 6 January 2000 and10 May 2001)

Research reports came to the following conclusions:

- **South African Human Rights Commission**. In October 1999 the South African Human Rights Commission (HRC) published a report on "Racism, racial integration and desegregation in South African public secondary schools". The document combined reports on research and the conference on racial integration in schools, held in March 1999. It found that there were myriad ways in which racism continued to plague schools. Almost two-thirds of the learners interviewed acknowledged that there had been incidents of racialism at their schools.

- **Human Sciences Council Report on deracialisation and migration of learners in South African schools: Challenges and implications, 2001.** This report departs from the point of view that statutory deracialisation in education has not guaranteed a smooth passage towards the realisation of successful school integration. The reports comments on a general inability of provincial departments, schools and communities to deal effectively with the change process in education. Examples of challenges remaining are:
    - racial conflict
    - cultural intolerances
    - daily migration of learners from "Black" townships to "White" suburban schools in search of better education, and
    - exorbitant school fees and transport fees that some parents have to meet.
- **Education Foundation Report on macro-indicators of racism in the schooling system (2001).** The report is an attempt to comply with a recommendation in the abovementioned HRC report[li] that racism in schools be addressed by monitoring existing legislation, policy and practices. This report provides relevant quantitative data on changes in the schooling system since 1994.

As regards learner enrolment (access to schooling), the report points out that African learner enrolment increased by 1.2 million from 1991 to 1994 and by 702 315 from 1994 to 1997. White learner enrolment decreased by 21% over the same period. In 1997 only three provinces had a fairly even split between uniracial and integrated schools namely Gauteng (48% integrated schools), Northern Cape (56% integrated schools) and Western Cape (46% integrated schools). Six provinces had more than 70% uniracial African schools (Eastern Cape - 90%, Free State - 75%, KwaZulu-Natal - 86%, Mpumalanga - 77%, Northern Province (now Limpopo) - 95% and North West - 74%. It is only in the Northern Cape (1%) and the Western Cape (13%) where there were uniracial White schools (1% for the country).

According to the report, 17% of African Children in the age group 7-18 (school-going age) were out of school in 1996. In the case of White children the figure was 9%.

Age

The Minister of Education published age requirements for admission to an ordinary public school in terms of section 3(4)(i) of NEPA and section 5(4) of SASA.[23] Item 4 of this notice provides that a learner must be admitted to Grade 1 if he or she turns seven on that calendar year. A learner who is younger than this age may not be admitted to Grade 1. Item 2 of the notice has the effect that a learner who is older than the number of the grade plus 6 years cannot be admitted to a particular grade, for example a learner who is older than 7 years may not be admitted to Grade 1 and one is older than 18 years may not be admitted to Grade 12. This creates *prima facie* discrimination against those younger than 7 who may be ready for school and against those who exceed a certain upper age limit (even if there are good political, social and economic reasons why they are "over age"). Bertelsmann[24] points out that there are no criteria for determining whether learners who exceed the Age norm by more than 3 years should be allowed to continue in school. This would seem to create, therefore, differential treatment of those who are under and over the set age limits.

---

[23] *Government Gazette*, Vol. 400, No. 19377, 19 October 1999, Notice 2433 of 1998.

The Minister published an identical item 3 on age requirements for admission to independent schools in 2000 in terms of section 3(4)(i) of NEPA.[25] This notice was meant to achieve uniformity between public and independent schools.

The independent school requirements were challenged in the Transvaal High Court and on 15 January 2001 Coetzee J declared the notice to be invalid and unconstitutional and authorised King David Primary School to enrol Talya Harris[26] Grade 1. The Minister of Education appealed to the Constitutional Court and Sachs J handed down judgment in Doreen Harris v Department of Education (CCT 13/01) on 5 October 2001.

Judge Sachs summarised Judge Coetzee's findings in the Transvaal High Court as follows:

- The Minister's notice discriminated unfairly against Talya and similarly situated children, was unjustifiable and violated section 9 of the CRSA (unfair discrimination on the basis of age).
- The Minister's actions (requiring Talya to repeat her final pre-primary year) was against section 28(2) of CRSA (the paramountcy of a child's best interests in any matter concerning a child).
- The Notice was *ultra vires* the powers of the Minister – the Minister was authorised to determine national policy on age of admission but not empowered to make law.
- The Minister usurped a provincial executive power when he stated in the notice that the age requirements had to be applied as an additional prerequisite for the registration of independent schools.[27]

Judge Sachs declined to pronounce on the correctness of Judge Coetzee's finding that the notice was unconstitutional. He did find, however, that the Minister had exceeded the powers conferred on him by section 3(4) of NEPA and had infringed the principle of legality. The appeal was therefore dismissed with costs. The Minister has subsequently amended the requirements by inserting an item 4(A)[28] which reads as follows:

---

[24] fn 22.

[25] *Government Gazette*, No 20911 of 18 February 2000, Notice 647 of 2000.

[26] Talya Harris turned 6 on 11 January 2001 and was part of a group of children who spent three years in King David Pre-primary School being prepared for entry to the primary school in 2001. Her mother challenged the validity of the Minister's notice on independent schools.

[27] Item 5 of the Notice.

> Despite paragraph 4, the Head of Department may allow a learner who wants to be admitted to grade 1, but who will not be turning 7 during the year of such admission, to be admitted at a lower age. This deviation by the Head of Department may only occur if, in the opinion of the Head of Department, reasonable grounds exist that such a learner is, based on educational principles, school ready for grade 1 and it is in the best interest of such a learner to be admitted as an underage learner to a public school. The parent of the learner must show that the refusal to be admitted to a school will have a detrimental effect on the child's development.[29]

Another instance of *prima facie* discrimination on the basis of age is contained in section 10(1)(a) of the Employment of Educators Act (EEA), 76 of 1998 which provides that:

(1) (a) Subject to the provisions of this section, an educator shall have the right to retire, and shall be so retired, on the day on which the educator attains the age of 65 years.

It would be very surprising if this provision were not challenged sooner rather than later on the grounds of unfair discrimination on the basis of age.

Disability

Despite provisions such as the following learners with disabilities (special educational needs) do not enjoy access to a system which will ensure equal educational opportunities for them:

- [D]iscrimination means any act or omission ... which directly or indirectly –
  (a) imposes burdens, obligations or disadvantage on; or
  (b) withholds benefits, opportunities or advantages from,
  any person on one or more of the prohibited grounds [among others disability].[30]
- Subject to section 6 [of the Equality Act] no person may unfairly discriminate against any person on the ground of disability, including -

---

[28] *Government Notice* No 1356 of 11 December 2001.

[29] It is interesting that the Minister still regards such a learner as underage while the learner has been admitted. This seems to be a *contradictio in terminis*. When the case was heard in the Transvaal High Court, counsel for the minister had adduced that opening public schools to learner younger than 7 would clog up the system and that resources in this regard were inadequate (see Bertelsmann (2001) *Comments* in **Perspectives in Education**, 19(4):29-33. Ironically, in his 5th report to the president on the state of education in the provinces, the Minister states that the number of learners aged six who applied for admission was "insignificant." (p 1) except for two provinces where the significant numbers did not seem to create any significant challenges to the system.

[30] Section 1 of the Equality Act.

(a) denying or removing from any person who has a disability, any supporting or enabling facility necessary for their functioning in society

(b) contravening the code of practice or regulations of the South African Bureau of Standards that govern environmental accessibility;

(c) failing to eliminate obstacles that unfairly limit or restrict persons with disabilities from enjoying equal opportunities or failing to take steps to reasonably accommodate the needs of such person.[31]

- The second item in the illustrative list of unfair practices (namely in the education sector) in the Schedule to section 29 of the Equality Act labels the following, among others, as unfair practices –
    - Unfairly excluding learners from educational institutions, including learners with special needs.

The practical situation speaks of significant dissonance and tensions between provisions or rights and practice, for example:

- 280 000 disabled children younger than 16 years are not in schools or colleges[32] - enough to fill 948 schools with approximately 330 learners each
- In the past, education for learners with special needs were provided on a racial best with the bet "human, physical and material resources" reserved for whites[33]
- Race and disability were both sued as segregating criteria[34]
- The government proposes short-term, medium-term and long-term steps to effect the inclusion (as opposed to mainstreaming or integration) of all learners with special education needs[35]

CONCLUSION

It is clear that there are many provisions and ideals on and about equality regarding race, age and disability as they apply in education. It is also abundantly clear that there will be significant contestation resulting from tensions between reality and ideal before equality in terms of race, age and disability is achieved.

---

[31] Section 9 of the Equality Act.

[32] *Education White Paper 6 Special Needs* Education – Building an Inclusive Education and Training System. Pretoria: Department of Education, July 2001, p 4.

[33] *Ibid.*

[34] P 9.

[35] Pp 42 – 43 indicate that the long-term steps could take until 2121 to implement.

B LABOUR RELATIONS

Introduction

In 1994 the incoming government in South Africa inherited militant trade unions which acted as social agents for achieving democracy and which had considerable influence in party politics and in areas of decisions making in policy matters.[36]

The militancy of trade unions had simmered during the struggle against apartheid and the unions included social and economic issues in their agendas.[37] The engagement in diverse social, economic and political issues, in addition to traditional purposes of improving conditions of service, led to a rise in strikes. In the 1990s there was a proliferation of labour disputes,[38] mainly because of political liberalisation.

Disputes continue to occur despite the existence of conciliation and collective bargaining measures. As a result, in South Africa July and August have become known as the strike season.[39] We can predict at the beginning of the year that there is going to be an increase in industrial action as a result of a number of factors including a downward pressure on wages.

The focus of this article is not the rise in industrial action on the consequences of frequent strikes. I argue that labour liberalisation[40] increases strikes in education. An educator's strike has a severe

---

[36] Patel, E (ed). 1994. *Worker rights. From apartheid to democracy. What role for organised labour?*, p. 22. Kenwyn: Juta.

[37] Govender, L. 1996. *When the chalks are down. A historical, political and social interpretation of teacher militancy in South Africa*, p.56. Pretoria: Human Sciences Research Council.

[38] Jayriya, E. 1999. Most labour disputes occurred in the Western Cape. *The Star*, Wednesday September 8, p. 8.

[39] Msomi, S. 1999. Employers, trade unions rapped over knuckles. *Sunday Times Business Times*, September 12, p. 1.

[40] Labour liberalisation refers to labour rights accorded to educators as in section 23 of the Constitution Act 108 of 1996. This section provides that:
Labour relations
23. (1) Everyone has the right to fair labour practices.
  (2) Every worker has the right –
    (a) to form and join a trade union
    (b) to participate in the activities and programmes of a trade union; and
    (c) to strike
  (3) Every employer has the right
    (a) to form and join an employers' organisation; and

BEST COPY AVAILABLE

human cost which unfortunately has little influence on government decisions. It also tends to be unpopular and is often regarded as unacceptable by public opinion.[41] Strikes in education do not inflict an economic loss as in the private sector, but rather human cost in the form of e.g. a high failure rate.[42] The employer is not directly hurt. A harm is inflicted on the innocent child, but not the employer – a party who is not even contemplated in the labour relations.

I will substantiate my argument with data drawn from primary and secondary sources. From these sources I will draw illustrations on concepts such as unfair labour practices, the right to strike and conclude by indicating how a balance between collective rights and individuals rights can be attained.

Conceptualisation

Labour liberalisation should be understood as a contradictory process which presents both dangers and opportunities for the trade union movement.[43] On the one hand, it exposes trade unions to public scrutiny especially when a *post mortem* is done on matric (school leaving) results. Educators are often criticised and blamed for high failure rates. They are accused of being selfish by concentrating on their conditions of service. On the other hand, it creates opportunities for educators to exercise rights which they did not have to fight for in the past, including the right to strike.[44] The right to strike as provided in the Labour Relations Act (LRA) No. 66 of 1995 section 64 creates a dilemma and imbalance when

---

(b) to participate in the activities and programmes of an employers' organisation

(4) every trade union and every employers' organisation has the right –
  (a) to determined its own administration, programmes and activities;
  (b) to organise; and
  (c) to form and join a federation.

(5) Every trade union, employer's organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1).

(6) National legislation may recognise union security arrangements contained in collective agreements.

[41] Prinsloo, JG. 1998. Power sharing in education: dilemmas and implications for schools. In: De Groof, J, Bray, E, Mothata, S & Malherbe, R (eds). *Power sharing in education: dilemmas and implications for schools*, p. 76. Amersfoort: Acco.

[42] Taunyane, LM. 1998. South Africa can not afford the cost of matriculation failures. *City Press*, February 8, p. 17.

[43] Buhlungu, S. 2000. A question of power. Co-determination and trade union capacity. In Adler G (ed) *Engaging the state and business. The labour movement and co-determination in contemporary South Africa*, p. 180. Johannesburg: Witwatersrand University Press.

[44] Wood, G. 1998. *Trade union recognition. Cornerstone of the new South African employment relations*, p. 71. Johannesburg: Thomson Publishing.

applied in education. Although the Act provides for lock-outs (section 67) and replacement labour (section 76), very little is done during strikes to continue rendering education to learners. The child's right to education is infringed. In fact it is provided in section 29(1) of the constitution that:

> 29(1) Everyone has the right –
>
> (a) to a basic education, including adult basic education; and
>
> (b) to further education, which the state, through reasonable measures, must make progressively available and accessible.

The question here is whether, by allowing educators to strike, the state is making education available and accessible. The exercise of the right to education requires by implication the existence and maintenance of a minimum of education. The right to (basic) education is not qualified and accordingly the state will have less discretion in refusing to make education available. Closing down public schools during strikes which has the effect of depriving people (learners) of a basic education *prima* facie constitutes an infringement of this right and requires justification in terms of section 36 of the Constitution.[45]

Thus, the right to strike in education infringes the learner's right to basic education. The right to strike can be categorised as a subjective right.[46] The fundamental premise of the doctrine of subjective rights is that wrongfulness consists of the infringement of a subjective right. All legal subjects (educators and learners) are holders of subjective rights. The holder of a subjective right has a right over something enforceable against other people. This indicates the dual relationship that characterises every right. There is a relationship between the holder of a right and all other persons. This is a subject – subject relationship.

This relationship implies that the holder of a right may enforce his powers over a legal object against all other legal subjects and that, as a corollary, a duty rests on all other legal subjects not to infringe the relationship between the holder of a right and the object of his right. Thus every right has a corresponding duty. Given the unequal powers that employers and employees have, subjective rights arise to recognise employees' interests as being worthy of protection. This explanation suffices for now I will return to it later.

The right to strike

The potential of a conflict exists within any social structure. Generally the use of industrial action (strikes) within the employee relations system is an explicit, collective expression of both concern and power. It is intended to help secure a more favourable outcome to a negotiation or to resist unacceptable employer's action.[47] Its power derives from the capacity to create a situation of temporary disorder within the employment relationship and by so doing, prevents even the most enlightened managerial regime from becoming mere paternalism. However, it appears that the use of strikes may be an intolerable abuse of economic freedom and type of warfare which allows some groups to make gains at the expense of others.

---

[45] Davis, D, Cheadle,H & Hayson, N. 1997. *Fundamental rights in the Constitution. Commentary and cases.* Kenwyn: Juta.

[46] Neethling, J, Potgieter, JM & Visser, PJ. 1999. *Law of delict*, p. 49. 3rd ed. Durban: Butterworths.

Strikes[48] are ostensibly incompatible with the best interests of the child.[49] Strike may cause a breakdown of the trust between educator and learner. Strikes are indicative of an imbalance in this relationship and a neglect of obligations. Nowhere is the concept of the child's best interests consonant with strikes. The legislation that the government created in the area of the child's best interests is generally projected as being in the "in the public interest"[50] and therefore if some action is stated to be "unlawful" then, by implication, it is also morally wrong and people become socialised into accepting it as such. The question arises as to whether educators have a right to strike. A strike is designed to cause harm to an employer and often causes harm to individual educators who are not or do not wish to be involved in the dispute, and learners who are not party to the employment relationship.

In South Africa there is reluctance to call the freedom to strike a right because of the nature and consequences of a strike. Strikes force others to do what they do not want to do.[51] Certainly by granting employees and trade unions "immunity" from legal action when undertaking a "lawful" industrial action implies that it is a privilege – not granted to other groups in the society – rather than a right, and, as such, the right may be withdrawn if it is not exercised in a responsible manner. Strikes should be acceptable to the government as the guardian of national interests and therefore the child's best interests. This the government does by restricting the scope of immunity, by narrowing the boundary of lawful strikes and tightening procedural requirements. The government has also widened the range of interested parties who can instigate legal action against trade unions not just to include management or trade union members but also a private citizen who feels she or he might be affected by the industrial action.[52]

---

[47] Hollinshead, G, Nochols, P & Tailby, S. (eds). 1999. *Employee relations*, pp. 199-200. London: Pitman Publishing.

[48] The concept strike means, according to section 213 of the LRA, partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed b the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee.

[49] De Waal, E, Theron, T & Robinson, G. 2001. An education law analysis of the learner's best interests. *Perspectives in Education*, Vol. 19(4):151-161

[50] Pepin, L. 1990. Teachers' trade union rights. *International Labour Review*, 59-61.

[51] Du Plessis, JV, Fouché, MA, Jordaan, B & Van Wyk, MW. 1994. *A practical guide to Labour Law*, p. 298. Pretoria: Digma.

Remedies

Essential service

Given public disapproval of strikes in education, education should be declared an essential service. According to section 213 of the LRA an essential service means:

(a) a service the interruption of which endangers the life, personal safety or health of the whole or part of the population.

The reference to Parliamentary service and the South African Police Services in the above section is acceptable. However, the above category must be debated and interpreted. It is not quite clear why the Essential Services Committee does not include education in the list of designated essential services.[53] If education is declared an essential service, it would mean that educators will not be able to strike but would have to follow a particular procedure (section 74 of the LRA) to resolve disputes.

Collective bargaining

The LRA provides a wide range of dispute resolution structures.[54] These structures help in reducing strikes by providing justice in labour matters. However, in recent years collective bargaining has lost credibility because of unilateral implementation of decisions on conditions of service.[55] This attitude affected the credibility of collective bargaining. Collective agreements are not implemented as agreed in the bargaining councils.[56]

---

[52] Rautenbach, F. 1999. *Liberating South African labour from the law*, 91-94. Cape Town: Tafelberg.

[53] Basson, A, Christianson, M, Garbers, C, Le Roux, PAK, Mischke, C & Strydom, EML. 1998. *Essential Labour Law*, Vol. 2. Groenkloof: Labour Law Publications. This volume lists in pp. 114-115 designated essential service to include: air traffic control and regulations; Weather Bureau of the Department of Environmental Affairs and Tourism; Municipal Traffic and Policing services; Municipal Health Services; Municipal Security Services, the supply and distribution of water; the generation, transmission and distribution of electricity; fire fighting; services for the functioning of courts; correctional services and blood transfusion services.

[54] Anderson, F & Van Wyk, J. 1997. *Labour Law in action. A hands-on guide to the LRA*, pp. 54-55. Manzini: Macmillan Press. The structures include: bargaining councils, Commission for Conciliation Mediation and Arbitration, the Labour Court and the Labour Appeal Court.

[55] Maile, S. 1999. Policy implementation: the rise of trade unionism in education. A paper presented at the South African Education Law and Policy Association International Conference, Bloemfontein.

Collective misconduct

One of the most important labour law controversies in the 1990s was whether employers were entitled to take disciplinary action on an individual basis against employees who participated in illegal strikes (and so-called "stay-away" or "mass action" absences) or whether discipline had to be imposed collectively. The individual approach took the form of charging employees guilty of embarking on an illegal strike with disciplinary offences such as "unauthorised absence from work" or "absence without permission". Some form of disciplinary enquiry would then be held on an individual basis and an appropriate disciplinary penalty would be imposed on each individual employee.[57] The principles of progressive discipline would be applied. This means that if the employee had a clean disciplinary record, a sanction short of dismissal would be imposed. This includes a warning or even a final written warning. However, if an employee had received previous warnings for absence without permission or similar offences, and if these warnings were still valid, the principles of progressive discipline would mean that a more severe sanction would be imposed in the case of that employee – often dismissal.

CONCLUSION

The right to strike has some limitations. It is based on statutory procedures. Although educators have the right to strike, striking should be used as a last resort when all dispute resolution measures are exhausted. I have established that strikes in education do not often inflict as much harm on the employer (the department of education) as on the child. It infringes the child's right to education, thus the right to strike is categorised as a subjective right. I also discussed the remedies to this problem. They include declaring education an essential service and the effective use of collective bargaining and collective misconduct (dismissal).

---

[56] Legotlo, W. 1998. Collective bargaining in the Education Sector: Legal dilemmas. A paper presented in SAELPA conference, 1998, pp. 4-5. Legotlo indicates that there is failure to implement agreements on the right sizing of educators, post provisioning scales, salary and appraisals. Collective bargaining is characterised by bad faith and ineffective communication.

[57] Le Roux, PAK. 2000. Mass action, strikes and lockouts: A review of some important cases. *Contemporary Labour Law*, Vol. 9(7):61-65 (February 2000). Annotations – cases include: *National Union of Mineworkers and Others v Free State Consolidated Gold Mine (Operations) Ltd* (1995) 16 ILJ 1371 (A) and *SACTWU and others v Novel Spinners (Pty) LTd* (1999) II BLLR 1157 (LC); *FAWU and others v Amalgamated Beverage Industries Ltd* (1994) 15 ILJ 1057 (LACT); *Chauke and others v Lee Service Centre CC +/a Lesson Motors* (1998) 19 ILJ 1441 (LAC). Also see Le Roux, PAK. 2001. Dismissal for collective misconduct. A matter of evidence. *Contemporary Labour Law* Vol 11(2):11-15 (September 2001).

C FREEDOM OF EXPRESSION

Introduction

For many years children were not only seen as minors who lacked iudicium (judgement) but as human beings without any iudicium. This in fact led to the infringement of many of their rights as human beings.

Legislation

The fundamental rights of children in South Africa are protected under section 28 of the Constitution of the Republic of South Africa, Act 108 of 1996 (CRSA). It would be an infringement of this right and a degradation to view the child (a person under the age of 18[58]) as having no iudicium and therefore no right to expression. In addressing the learner as a human being with dignity,[59] we should also consider his/her point of view or opinion in matters concerning him/her. Children have the right to speak out on matters (freedom of expression[60]) as well as being consulted for example learners should be consulted before finalizing the code of Conduct for Learners.[61]

In defining the concept of expression it is also necessary to focus on the choice of the word "expression". "Expression" is a wider concept than 'speech' and includes activities such as painting and sculpting, displaying posters, dancing and the publication of photographs. Symbolic acts such as flag burning, the wearing of certain items of clothing and physical gestures amalgamate under the right to freedom of expression.

Children as minors need to be guided in the school situation to execute not only their fundamental rights but also to deal with their obligations and responsibilities in a democracy.

A democracy needs critical thinking

The public school, as education mentor for children (learners) in a democracy, becomes the forum where the children are guided to adulthood and guided to fulfil their place in a democratic society.

After establishing our new democracy in 1994, it was necessary to change the school methodology in order to develop citizens' skills for participation in a democracy. The old curriculum was based on the retention of information and theory. Since the South African government was aware of the importance to develop critical thinking, education methodology has changed from one that was educator centred to one that is learner centred. This new curriculum should *be skills-orientated and applicable in practice. One of the outcomes of this new methodology is per* se to develop critical thinking.[62]

---

[58] Section 28(g)(i) of CRSA.

[59] Section 10 of CRSA.

[60] Section 16 of CRSA.

[61] Section 8(1) of the South African Schools Act, Act 84 of 1996(SASA).

A prerequisite for critical thinking

It is necessary to enhance and respect freedom of expression in order to develop and encourage critical and independent thinking. Freedom of expression creates a market place of ideas[63] and ensures individual development and self-fulfilment[64] Therefore De Waal *et al.* (2001:310) argue that the denial of this right would be inhuman because it is an essential human activity to express oneself.

An internationally protected right

The importance of the right to freedom of expression as a pillar of democracy is clear when one sees that this right is protected in all of the major international human rights instruments.

The freedoms of expression, opinion and information are also protected in article 19 of the Universal Declaration of Human Rights (UDHR) of 1948, which is a clear indication that freedom of expression is a fundamental right.[65]

Limiting this right

As is the case with all fundamental rights, the right to freedom of expression is not absolute and must be balanced against other freedoms and rights. According to Rautenbach and Malherbe (1999: 345) all rights can be limited "under specific circumstances and in a particular way for the protection of some public interest or the rights of other." So it was also agreed upon at the Sixth International Symposium on the European Human Rights Convention and Freedom of Expression "that no democratic society has yet removed the obstacle to full freedom of expression, and it is improbable that any will do so in the near future.[66]

---

[62] **Cape Argus**. 1997:8.

[63] Abrams v United States 250 US 616 (1919).

[64] Clayton, R. and Tomlinson, H. 2001. **Privacy and freedom of expression**. London: Oxford, p 112; De Waal, J, Currie, I, and Erasmus, G. 2001. **The Bill of Rights Handbook.** Cape Town: Juta, p 310.

[65] Türk, D and Joinet, L. 1999. The right to freedom of opinion and expression: Current problems of its realizaton and measures necessary for its strengthening and promotion. In: Coliver, S (ed.). **Striking the balance. Hate speech, freedom of espression and mom-discrimination.** London: University of Essex, p 37.

[66] Türk and Joiner, p 37.

Looking at two critical South African incidents, we indicate that the intention of the protection of this fundamental right is not clear when implementing it at school level. This right is still infringed upon and not balanced to enhance the new democracy.

Conclusion

The right to freedom of expression cannot be absolute. It can be limited when it is reasonable and justifiable in an open and democratic society based on human dignity, equity and freedom. Secondly it can be limited according to its inherent limitations.[67]

Recommendations

School managers and SGB's must create a forum for the right to freedom of expression on all levels of learner participation. Learners need to have a say in the choice of curriculum as well as extra-curricular activities. A forum should be developed where every learner can speak out against the Code of Conduct or other matters at school. Before any decision is made, learners should have a say e.g. on matters as school policies; cultural and sport activities. A policy should also be developed to reflect learners' expressions on matters e.g. in school/learners' newspapers.

This point of view of learners on any matter should then by means of learner representation be discussed in the SGB[68] and changed if necessary according to the changing views and values of a society. SGB's must learn to accept the fact that to differ in opinion is not negative but an enrichment of adulthood in a democracy. When a learner differs from an educator or the principal on good and reasonable grounds, it is only the issue that is at stake. The authority or respect is not questioned if this is the case. Freedom of expression should be used to help develop positive critical thinking.

D RELIGION

The right to freedom of religion, belief and opinion

The protection of human rights in South Africa and in particular the impact of the Bill of Rights on social change cannot properly be assessed without reference to other factors and mechanisms that influence this objective.

First, the new constitutional order cannot be separated from the apartheid past. The Preamble to the Constitution states that the people of South Africa recognise the injustices of the past, honour those who suffered for justice and freedom, and adopt the Constitution to heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights.

---

[67] See section 36 of CRSA.

[68] School Governing Body elected and constituted in terms of SASA. The SGB comprises among others learners in grades 10 –12.

BEST COPY AVAILABLE

The right to freedom of conscience, religion, thought, belief and opinion in section 15(1) has important implications for education. The right protects one's beliefs, but also one's right to promote, teach and manifest those beliefs.[69] Included in the right is also the right to join others in manifesting one's beliefs.[70] The question is how this right is exercised in the educational environment.

Section 15(2) deals specifically with the manifestation of one's religious convictions in state or state-aided institutions, such as schools. It provides that religious observances may be conducted at state or state-aided institutions, provided that such observances follow rules made by the appropriate authorities, are conducted on an equitable basis, and attendance are free and voluntary.

Section 15(2) distinguishes South Africa from the American position, where the so-called establishment clause has led to a situation where all forms of religious observances have been banned from public institutions like schools.[71] As a matter of fact, the Constitutional Court has held that the South African Constitution rejects the strict wall of separation doctrine found in the United States.[72]

Religion and education in the United States of America

The Free Exercise Clause embraces a freedom of conscience and worship that has close parallels in the speech provisions of the First Amendment, but the Establishment Clause is a specific prohibition of forms of state intervention in religious affairs with no precise counterpart in the speech provisions. The explanation lies in the lessons of history that were and are the inspiration for the Establishment Clause, the lessons that in the hands of government what might begin as a tolerant expression of religious views may end in a policy to indoctrinate and coerce

---

[69] Malherbe, EFJ. 1998. Die grondwetlike beskerming van godsdiensvryheid in *TSAR*, 680.

[70] This aspect of the right is covered by section 18, which provides for the freedom of association, but even more expressly by section 31, which provides *inter alia* that members of a religious community may practise their religion together with other members of that community.

[71] See eg Chandler *et al.* 1999. *Constitutional Law Deskbook: Individual Rights* , 90 ff; Witte J and Green "The American constitutional experiment in religious human rights: the perennial search for principles" in Van der Vyver JD and Witte J (eds) *Religious Human Rights in Global Perspective* (1996) 497ff; Van der Vyver JD "Introduction" in Van der Vyver and Witte xi-xlvii; Witte J "The South African experiment in religious human rights" 1993 *Journal for Juridical Science* 1ff; Valente *Law in the Schools* (1980) 109ff; Underkuffler-Freund LS "Religious guarantees in a pluralistic society: values, problems and limits" 1997 *SA Public Law* 32ff.

[72] *S v Lawrence; S v Negal; S v Solberg* 1997 10 BCLR 1348 (CC) paras 100-102; 116-118.

Constitutionality of voluntary religious instruction in public schools[73]

The concept of public schools' releasing children during the school day in order that they may receive religious instruction has taken several forms in practice. One such program was challenged before the Supreme Court of the United States in 1948.[74] In Champaign, Illinois, interested members of Jewish, Roman Catholic, and Protestant faiths formed a voluntary association and obtained board of education approval of a cooperative plan to offer religious classes.

Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend. Classes were held weekly, thirty minutes for the lower grades, forty-five minutes for the higher grades. The classes were taught in three separate religious groups by Protestant teachers, Catholic priests, and a Jewish rabbi, Classes were conducted in the regular classrooms of the school building. Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies. On the other hand, students who were released from secular study for the religious instructions were required to be present at the religious classes. Reports of their presence or absence were to be made to their secular teachers.

The Supreme Court by a vote of eight-to-one invalidated the program. The Court pointed out that not only were the tax-supported public school buildings being used for the dissemination of religious doctrine, but that the state also afforded sectarian groups an invaluable aid in that it helped to provide pupils for their religious classes through use of the state's compulsory education machinery. "This is not separation of Church and State."

Four years later the constitutionality of a different type of "released time" program was considered by the Supreme Court.[75] A New York statute, as implemented by regulations of the state commissioner of education, expressly provided for the release of public school pupils from public school attendance to attend religious classes off school premises. Those who contested the New York plan contended that it was not basically different from the Champaign plan. Their key argument was that the weight and influence of the school was used to support a program of religious instruction because records were kept of attendance of pupils released to attend religious classes, regular classes were halted during the period of "released time," and pupils not attending such classes were required to remain in school.

---

[73] People of State of Illinois ex rel. McCollum v. Board of Educ. of School dist. no. 71, Champaign County. 1948 Supreme Court of the united states, 1948.333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649.

[74] People of State of Illinois ex rel. McCollum v. Board of Educ. of School Dist. No. 71, Champaign County, 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948).

[75] Zorach v. Clauson, 343 U.S. 306, 72 S.Ct. 679, 96 L.Ed. 954 (1952).

BEST COPY AVAILABLE

By a vote of six-to-three the validity of the plan was sustained. The majority reasoned that the state can "accommodate" the religious wishes of parents to the extent of releasing pupils at parental request at a specified time. That school buildings were not used for the religious instruction was a crucial difference from the Champaign case. The majority commented that the problem, like many in constitutional law, was one of degree, here degree of "separation of Church and State." Analogy was made between this arrangement and excuses accepted for student absences for religious reasons.

Bible reading

In 1963, in an eight-to-one decision, the Court found Bible reading to be in violation of the establishment clause of the First Amendment (made applicable to the states by the Fourteenth Amendment).[76] The Court took the occasion to extensively document the point that in barring this exercise as part of the school program it was not deviating from its established precedents in the area of church-state-education relationships. It ruled that the Bible was a sectarian document, a point which had been the subject of considerable litigation in state courts over the years with varying holdings. The Court stated that the First Amendment and its subsequent interpretations indicated that there should be a neutrality of the state in regard to religious matters. This neutrality was based on the premises that the government could not aid any or all religions and that every person has a right to choose a personal course with reference to religion free of any compulsion from the state. The Court observed that it had consistently held that the clause of the First Amendment regarding religion withdrew from government all legislative power respecting religious belief or the expression thereof.

Prayers

The legality of prayers in the public schools was argued in many courts with differing results before the Supreme Court decided a case on the subject in 1962. Most of the cases involved prayers as part of a school's opening exercises, often in combination with Bible reading. The first prayer case to be accepted by the Supreme Court was from New York and involved use of a specially written prayer designed to inculcate "moral and spiritual" values and purported to be non-sectarian.[77] The prayer was composed by state educational authorities (the Board of Regents) and suggested for use by local school boards. A local school board then required that the so-called Regents' prayer be said in its classrooms; however, any pupil could be excused on his parent's objection.

Dress code for teachers

---

[76] School Dist. of Abington Tp., Pa. v. Schempp, 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963).

[77] Engel v. Vitale, 370 U.S. 421, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962).

The Supreme Court of Oregon, in a case involving a teacher who had become a Sikh and thereafter wore white clothes and a white turban while teaching, held that the teacher was subject to a state legislative ban on religious dress while performing teaching duties.[78] The court said that the prohibition would not apply to incidental elements such as a cross or Star of David, nor to ethnic or cultural dress. In 1987 the Supreme Court dismissed her appeal "for want of a substantial federal question," thereby enhancing the precedential stature of the case.

The Third Circuit relied heavily on the preceding case in ruling against a female Muslim teacher who adhered to the religious conviction that she should, when in public, cover her entire body except face and hands.[79] She filed an unsuccessful discrimination in employment suit when the Philadelphia school district applied the old Pennsylvania statute on the subject that had been upheld eight decades before.

Religion and education in the South African situation

Section 15(2) of the South African Constitution allows state involvement in religious matters and corresponds with the traditional South African approach to religious freedom in terms of which the state has always been actively involved in the creation of favourable conditions for the exercise of religious freedom (without favouring a particular religion as may have been the case previously, because that would be inconsistent either with section 29(2) or section 9).

However, the provision refers to religious observances and not instruction. Religious instruction is subject to section 15 and should such religious instruction impose any kind of limitation on the religious freedom of the individual (for example, by imposing neutrality, or by offending the religious convictions of some learners), such limitation must comply with the limitation provisions in sections 36 of CRSA as well as with section 15(2).

A further implication is that religious instruction which, in terms of ordinary law, has to include a study of the various religions of South Africa, may still, as part of the exercise of the right to religious freedom, be presented from the point of view of a particular religion. Once again, the only condition in educational context is that this should be done equitably, free and voluntary.

The conditions under which religious observances may be conducted in schools are significant, because it protects learners who, in the context of the particular institution, adhere to minority religions, or learners without any religious convictions.

---

[78] Cooper v. Eugene School Dist. No. 4J, 301 Or. 358, 723 P.2d 298 (1986), app. dism. 480 U.S. 942, 107 S.Ct. 1597, 94 L.Ed.2d 784 (1987).

[79] United States v. Board of Educ. for School Dist. of Philadelphia, 911 F.2d 882 (3 Cir.1990).

- Firstly, the observances must follow the rules made by the relevant authorities, which, according to the SA Schools Act, refers to the governing bodies of schools.[80] Such rules may only regulate religious observances and may not prohibit them. The conduct of religious observances also does not depend on the issue of such rules and in the absence of rules one would still be entitled to conduct such observances. Otherwise, a governing body of a school could effectively thwart the exercise of this right by simply failing to make the relevant rules.
- Secondly, religious observances must be conducted on an equitable basis. This does not mean neutrality as in the United States,[81] but requires the governing body to ensure that one religion is not put at an advantage or disadvantage *vis-à-vis* others. Of course, the preferences of pupils are decisive and it would not make much sense if a religion not practised at a particular school receives similar attention and opportunity as others.
- It would not be a solution to ban religion from schools simply because equity does not seem easy to attain. Apart from being directly inconsistent with section 15(2), it would be a cop-out and would simply switch around any unfairness that may exist to those who do wish to conduct religious observances. Every institution simply has to devise mechanisms and procedures that will ensure that this right can be exercised as fairly as possible within the context of the particular institution.
- Finally, attendance at religious observances must be free and voluntary. Nobody may be coerced in attending them, either directly or indirectly. Teachers may not be compelled to lead such observances or participate in them. Pastors and other representatives of churches may lead observances, as long as a particular church is not favoured or prejudiced in the context of the particular school. Once more, the preferences of those desiring religious observances should be the determining factor.

It should be emphasised that section 15(2) accords constitutional protection to religious observances in educational institutions. It does not endorse any form of religious neutrality as in the United States. Neutrality would be inconsistent with section 15(2). All it does is to prescribe the conditions that religious observances shall be equitable, free and voluntary. For the same reason, the Constitution does not prohibit a school from subscribing to a particular religious ethos, as long as it is equitable, free and voluntary so that learners with other convictions are not disadvantaged.

The South African Constitution versus the political ideology

The South African education system before 1994 was based on what was incorrectly called the Christian-National Education ideology.[82] The majority of schools in South Africa still follow the practices of Christian education by reading from the Bible and saying prayers during assemblies, graduation ceremonies and other school-related activities. South African people are in general very religious people.[83]

---

[80] S 7.

[81] See O'Regan J in *S v Lawrence; S v Negal; S v Solberg* (n 231) para 116.

[82] The National Education Policy Act, 39 0f 1967 actually referred to education which has a Christian character and a national character. The concepts Christian and national were not linked in a hyphenated word.

Despite the clear provisions in the Constitution and the South African Schools Act, Act 84 of 1996, the Department of Education has been revising its policy on religion in schools for more than two years now. Jewish, Christian and Muslim religious observances was allowed in school hours in accordance with the ethos of the school and as long as they remain optional, non-sectarian and non-discriminatory.

The new education policy document[84] [85] drafted by the Department of Education demands that assemblies should not be used as "occasions for religious observance". Thus, no prayer, reflections, music or any particular religious practice at all may be exercised even where all educators and all learners would be in favour of it. The policy imposes a compulsory and exclusive multi-faith approach to religion on schools. It states that teaching " a world of religious diversity" would encourage learners to think in terms of a new national unity in South Africa. Existing teachers in religion will have to undergo "significant retraining" before they will be allowed to teach religion. This policy conflict with section 15 of CRSA and is likely to create tension between the Department and those schools that will have to discontinue certain practices.

While many European countries have been privatising schools by handing them over to churches and religious communities, South Africa's Minister of Education is following the opposite trend. Minister Kader Asmal, Minister of Education, revised the religious policy without meaningful public consultation. Religious communities, educational bodies, parents, and stakeholders were largely excluded in the drafting of the policy.

South African schools are in dire need of case law to guide education policy makers and educators in the interpretation and implementation of section 15 of our comprehensive Constitution. We live in an age in which a just society is sought, not only through democratic constitutional institutions, mechanisms and processes, as important and indispensable as they may be, but in particular through the constitutional protection of human rights. In South Africa we envy Americans' access to the many court rulings that have addressed cases on this subject.

The religious liberty protected by the Constitution is abridged when the State affirmatively forces a particular ideology such as multi-religious learning onto religious communities.

---

[83] In terms of the latest census more than 70% of South Africans are practising Christians.

[84] Department of Education, 2001. Religious Policy

[85] See De Villiers, New ideology in school religion. **Dispatch on line**. 24 October 2001

CONCLUSION

South Africa has gone a long way towards implementing the provisions and principles of CRSA. Opportunities to exercise rights and freedoms equally have increased. Tensions still exist between provision and access to them. The tensions are likely to remain for a long time and creative solutions are required.

SOVEREIGNTY IMMUNITY AND PUBLIC HIGHER EDUCATION

M. Christopher Brown, Ph.D.
Associate Professor of Higher Education
Senior Research Associate
Center for the Study of Higher Education
Pennsylvania State University

Robert M. Hendrickson, Ph.D.
Professor of Higher Education
Associate for Research, Graduate Studies, and Faculty Development
Pennsylvania State University

Jason E. Lane
Research Associate
Office of Research, Graduate Studies, and Faculty Development
Pennsylvania State University

Education Law Association
48th Annual Conference
November 14-16, 2002
New Orleans, LA

OVERVIEW

Recent Supreme Court decisions have redefined the Court's interpretation of sovereign immunity and clarified the concept of federalism in relation to the state government's authority over education and the federal government's role in the national policy arena. Against this backdrop of recent Court rulings the federal government continues to assert its authority over a number of educational issues in both K through 12 and postsecondary education. Recent discussions of various policy issues in higher education point out this clash between federal and state authority over education (Cook, 1998). For example, notions of federal price controls on an individual's cost of higher education may inhibit the sovereign right of the State to maintain its own fiscal integrity (AGB). In the late 1990's, the Court made several decisions (*Seminole Tribe of Florida v. Florida, College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board et. al.,* and *Alden v. Maine*) which began to limit the Federal government's ability to abrogate sovereign immunity. In the last term of the Court (i.e. *Kimel et al. v. Florida Board of Regents et al.*), the Federal government's abrogation ability was further limited by eliminating federal protections over age discrimination within in state institutions. This presentation will explore the developing law on sovereign immunity and explore the implications for various federal regulations that impact higher education.

Legal History and Recent Decisions

While the Supremacy Clause[1] guarantees the right of Federal mandates to preempt state law under certain circumstances, the Tenth Amendment reserves those powers not delegated to the branches of the federal government to the respective States, with education being one of the reserved powers. The Eleventh Amendment insures the State's sovereign immunity by prohibiting suits by private citizens against the State in federal court. The right of the Federal government to preempt sovereign immunity has historically been justified by the Constitution's Commerce Clause[2] and Equal Protection Clause[3].

---

[1] U.S. Constitution art. VI, cl. 2

Limitations on Sovereign Immunity

During the last thirty years, the Supreme Court of the United States has dealt with interpretations of the Supremacy Clause and the Tenth and Eleventh Amendments to the Constitution. These cases all point to a clearer definition of the concept of federalism. In *National League of Cities v. Usery* (1976), the Court decided whether the Fair Labor Standards Act's wages and hours provisions would regulate state employees. The Court found that the Commerce Clause would allow the federal government to regulate labor but the Tenth Amendment limits federal regulatory power where it preempts the essentials of state sovereignty. Subsequently, *Hodel v. Virginia Surface Mining and Reclamation Ass'n* (1981) presented a three-part test used to establish state sovereignty or immunity from federal regulation.

> [. . .] First, there must be a showing that the challenged statute regulates the "State as a State." . . . Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." . . . And third, it must be apparent that States' compliance with federal law would directly impair their [States'] ability "to structure integral operations in areas of traditional government functions." (1981, pp. 287-288)

Citing *National League of Cities* and *Hodel*, the Supreme Court decided *EEOC v. Wyoming* (1983) where the state challenged the extension of the Age Discrimination in

---

[2] U.S. Constitution art. I, § 8, cl. 3

Employment Act of 1978 (ADEA) to state employees. The State of Wyoming had set a mandatory retirement age for state game wardens, which was challenged under ADEA. The Supreme Court, using the three part *Hodel* test, found that the state was not impaired from regulating the preparedness of game wardens. Under ADEA provisions the state as an employer could show that the age of a game warden would be a bona fide job criterion affecting preparedness. At the time the Court held that the ADEA did not inhibit the state from performing legitimate governmental functions nor preempt its sovereignty. These cases define both the limits of federal regulatory authority and the limits of states' authority to act as a governmental entity.

Cases

Equal Employment Opportunities Commission v. Wyoming 406 U.S. 226 (1983)
National League of Cities v. Usery, 426 U.S. 833 (1976)
Hodel v. Virginia Surface Mining & Reclamation Association 452 U.S. 264 (1981)
Pennsylvania v. Union Gas Company, 491 U.S. 1 (1991)

Expansion of Sovereign Immunity and Limitation of Commerce Clause

A line of cases dealing with state sovereign immunity in federal courts under the Eleventh Amendment further define the limits and scope of federal and state authority. Up until the mid-1990's, the Court had held that regulations crafted under the ambit of either the Commerce Clause or the Fourteenth Amendment preempted the sovereign immunity provisions of the Eleventh Amendment. In *Seminole Tribe of Fla. v. Florida* (1996) the Court reversed directions and found that Congress did not have the power to abrogate state sovereign immunity under the Commerce Clause. While, in *Pennsylvania v. Union Gas Co.* (1991) the Court found that the Commerce Clause could be used to abrogate state sovereign immunity, in *Seminole Tribe* the Court abandoned its previous

---

[3] U.S. Constitution art. XIV, § 1

rulings. Finding that the Commerce Clause and the Indian Commerce Clause were indistinguishable, the Court ruled that the Constitution's Articles I and III could not be used to circumvent a state's sovereign immunity Eleventh Amendment protections. This case clearly began placing limits on federal regulatory powers by expanding the state's protections under sovereign immunity

Cases

Seminole Tribe of Florida V Florida, 517 U.S. 44 (1996)
College Savings Bank v. Florida Prepaid Postsecondary Education Expense Board et al. 527 U.S. 666 (1999)
Florida Prepaid Postsecondary Education Expense Board et al. v. College Savings Bank, 527 U.S. 627 (1999)
Alden et al. v. Maine, 527 U.S. 706 (1999)

Expansion of Sovereign Immunity and Limitation of 14th Amendment Supremacy

In a recent Supreme Court decision, *Kimel v. Florida Bd. of Regents* (2000), the Court found, that even though Congress had clearly abrogated state sovereign immunity for violations of the Age Discrimination in Employment Act, Congress lacked constitutional authority to do so. The court's reason was that age is not a suspect category under the Equal Protection provisions of the Fourteenth Amendment nor does it meet the requirements of § 5 of the Amendment. The federal options with the loss of the Commerce Clause exception have been significantly narrowed. The decision of the Court in *Kimel* has subsequently opened the door for challenges to other federal protections, such as those based on gender and disabilities. The paper will focus on recent decisions concerning the Equal Pay Act, Age Discrimination in Employment Act, and the Americans with Disabilities Act and the likely implications for public educational institutions.

Cases

Kimel et al. v. Florida Board of Regent et al., 528 U.S. 62 (2000)
Board of Trustees v. Garrett, 531 U.S. 356 (2001)
Varner v. Illinois State Univ., 150 F.3d 706 (1998) Remanded and upheld in 528 U.S. 1110

Suggested Readings

Cook, Constance E. (1998). Lobby for higher education. Nashville, TN: Vanderbilt University Press.

Elmore, R. (1986). Education and federalism: Doctrinal, functional and strategic views. In D. L. Kirp & D. N. Jensen (Eds.), School days rule days: The legislation and regulation of education (pp. 166-186). Philadelphia, PA: Farmer. Elazar, D. J. (1987). Exploring federalism. Tuscaloosa, AL: Alabama Press.

Hendrickson, R. M. (1999). The colleges, their constituencies and the courts (2nd ed.). Dayton, OH: Education Law Association.

Balancing Rights in Teacher Evaluation:
Statutes, State Board Policies, and Contractual Rights

Dr. Carole V. de Casal
Professor and Chair
Department of Counseling and Leadership
Winthrop University
Rock Hill, SC

Dr. Charles M. Green
Principal, Frayser Jr/Sr High School
Memphis City School
Memphis, TN

Jerry Chappell
Teacher
Frayser Jr/Sr High School
Memphis City Schools
Memphis, TN

J. Sue Marsh, ABD
Curriculum Coordinator
Memphis City Schools
Memphis, TN

Outline of presentation

I. **Current status of state legislation regarding teacher evaluation.**
Dr. Carole V. de Casal

II. **Overview of State Board of Education rules, regulations and policies on teacher evaluation.**
Dr. Charles M. Green

III. **State Board of Education rules, regulations, and policies on teacher evaluation: congruencies and incongruencies with legislation.**
Jerry Chappell

IV. **Analysis of content of state teacher evaluation instruments.**
J. Sue Marsh

Documenting Inadequate Performance in an Era of Accountability

Kermit Buckner, Ed. D.
Professor and Chair, Department of Educational Leadership
East Carolina University
Greenville, North Carolina

Education Law Association
48th Annual Conference
November 14-16, 2002
New Orleans, Louisiana

Documenting Inadequate Performance in an Era of Accountability

Kermit Buckner, Ed. D.
Professor and Chair, Department of Educational Leadership
East Carolina University
Greenville, North Carolina
(252) 328-1119
Bucknerk@mail.ecu.edu

For the past three decades Congress and many state legislatures have been engaged in efforts to improve the quality of education in the nation's public schools. The origins of this effort to improve learning for all students in the public schools has been traced back to the civil rights movement, *Brown v. Board of Education of Topeka* (347 U.S. 483), and the publication of *Equality of Educational Opportunity* (Coleman et al., 1966). *Equality of Educational Opportunity* has been identified as "arguably, the most important and influential study ever concerned with the administration of America's schools (Haller and Kleine, 2001).

Federal efforts to influence school reform have come through requirements linked to federal assistance programs and through federal mandates. Through the *No Child Left Behind Act* (NCLBA), federal executive and legislative branches have established expectations regarding the quality of teaching and level of student achievement which states receiving federal funding are expected to meet. In his July 24, 2002 letter to state educational leaders, the Secretary of Education stated, "Accountability is central to the success of the *No Child Left Behind Act*: States need to set high standards for improving academic achievement in order to improve the quality of education for all students." The Secretary's call for accountability included consequences for schools that did not meet student performance goals. The letter noted that the ESEA "provides a list of consequences under 'school improvement,' 'corrective action' and 'restructuring' that allow States to take a range of actions. For example, under 'corrective action' the options range from more limited consequences such as hiring an outside expert to advise a school on how to make adequate yearly progress, to more significant measures such as replacing school staff or restructuring the internal organization of a school (http://www.ed.gov/News/Letters/020724.html)."

The reauthorized ESEA also addressed the quality of teachers working in the public schools. In section 1119 under Qualifications for Teachers and Paraprofessionals, it stated that "each local educational agency receiving assistance under this part shall ensure that all teachers...are highly qualified and that all teachers teaching in core academic subjects within the State are highly qualified not later than the end of the 2005-2006 school year." The legislation extended its reach beyond the specific programs and personnel covered by federal funding stating that " each local educational agency receiving assistance under this part shall develop a plan to ensure that all teachers teaching within the school district served by the local educational agency are highly qualified not later than the end of the 2005-2006 school year (http://www.ed.gov/legislation/ESEA02/)."

Efforts by the federal government to improve public education have been more than matched by state initiatives. Between 1990 and 2000 many state legislatures initiated public education restructuring efforts. Most of these efforts included a focus on improved teaching and improving student learning as measured by a state developed or nationally validated test. North Carolina was one state that received media attention and some recognition for its efforts to improve the quality of education for its students.

North Carolina's public school reform initiative was grounded in legislation that called for the creation of a school-based management and accountability program that would ensure improvement in student performance. That intent was expressed in North Carolina General Statute (NCGS) 115C-105.20. This legislation charged the State Board of Education to "develop a School-Based Management and Accountability Program." This legislation stated, "The primary goal of the Program shall be to improve student performance." It is this legislation and the impact it has had on public school principals as the school's chief change agents, as teacher evaluators, and as the school's professional development coordinator that this research was aimed. The conditions under which North Carolina principals work were not exactly like the conditions under which principals work in other states, but some similarities between the issues, problems, and opportunities all principals face as a result of the accountability movement that has swept the nation. This research may be instructive for principals who have faced or will face situations similar to those North Carolina principals have faced. It may also be of value to individuals who seek the most effective means to prepare principals for the accountability related world in which they will work.

The research presented in this paper examined the nature of policy creation at the local board level in response to accountability legislation, the impact of North Carolina's accountability program on principals in their roles as teacher evaluators, and the implications for principal preparation programs. This research included an analysis of legislation and policy surrounding accountability driven teacher evaluation, data on creation of local school board policies created in response to state legislation, case study and survey data on how principals are using an evaluation/development tool created to help them improve instruction and remove ineffective teachers, and data on how prepared principals feel to use that tool. This study was conducted in eastern North Carolina. It is limited in that it is focused on the legislation in one state and further limited by the fact that principals surveyed are all from the region of the state that is east of Interstate Highway 95.

Background

North Carolina has received national attention for its school reform efforts. The State Department of Public Instruction's web site has listed a number of the accomplishments that were directly associated with the state's accountability movement (`http://www.ncpublicschools.org`). That list includes the following:

> "North Carolina's accountability program, the ABCs of Public Education, was used as a model for the new federal education legislation, "No Child Left Behind" Act, signed into law by President Bush on Jan. 8. The bill requires annual testing in reading and mathematics in grades 3 - 8 with schools being required to show progress each year in the percentage of students proficient in these areas. North Carolina has required end-of-grade tests since 1993 and has held schools accountable for testing results since 1996.
>
> North Carolina continues its steady progress to lead the nation in education by 2010, according to the second annual First in America 2001 Progress Report for K-12 schools released by Gov. Mike Easley and the Education Cabinet in February 2002. The latest analysis of the state's performance found that we improved in three of the five goal areas in 2001: High Student Performance, "C+;" Safe, Orderly and Caring Schools, "B-

> ;" and Strong Family, Business and Community Support, "B." We held steady on Every Child Ready to Learn, "C+;" and on Quality Teachers and Administrators, "B-."
>
> North Carolina's testing program is tops in the nation, according to a new study released in June 2002 by The Princeton Review. States were ranked on 25 indicators in four criteria: test alignment to the states' curriculum standards, test quality, openness of the testing program to public scrutiny, and the extent to which the accountability system is used to support school improvement. North Carolina received a total score of 178.5 on the 200-point scale and a B+ for alignment, an A for test quality, a B for openness, and an A for policy. The Princeton Review is a national provider of test preparation and college admissions services.
>
> North Carolina received the highest score of any state for Improving Teacher Quality, according to Education Week's sixth annual 50-state report card on public education released in January 2002. A letter grade of "B+" was the highest grade given to any state in this category. This is the second year in a row North Carolina has led the nation in this significant area. North Carolina also was credited for being a pioneer state in early-childhood efforts, thanks to Smart Start, the TEACH program, and the Governor's More at Four program. The state received a "B" on Standards and Accountability.
>
> In 2000-01, the fifth year of the ABCs of Public Education for K-8 schools and the fourth year for high schools, 71.7 percent of students in grades 3 - 8 were considered proficient in reading and mathematics, up 10 points from 1996-97. In regards to school performance, 24.1 percent made exemplary growth; 35.6 percent made expected growth; 38.8 percent received no recognition; and 1.4 percent were deemed low performing. Overall, 59.7 percent met either expected or exemplary growth standards."

When the North Carolina General Assembly enacted NCGS 115C-105.20, the State Board of Education's answer to its charge to "develop a School-Based Management and Accountability Program" came in the form of a set of policies generally known as the ABC Program. The Board's answer to the legislative charge to make improved "student performance" the primary goal of the program came in the creation of end-of-grade and end-of-course assessments designed to enable the state to evaluate its schools. The ABC Program included rewards for the schools that succeeded and sanctions for the schools that did not. To further support the ABC Program the legislature passed additional statutes. The impact of this legislation fell directly upon principals and teachers in the state's public schools. Classification as a low performing school came with severe consequences for principals and teachers. As the instructional leader and primary evaluator of teachers, North Carolina principals have found themselves in a new and precarious employment position. Under the provisions established by NCGS 115C-105.39, "within 30 days of the initial identification of a school as low-performing...the superintendent (was required to) take one of the following actions concerning the school's principal: (i) recommend to the local board that the principal be retained in the same position, (ii) recommend to the local board that the principal be retained in the same position and a plan of remediation should be developed, (iii) recommend to the local board that the principal be transferred, or (iv) proceed under G.S. 115C-325 to dismiss or demote the principal. The principal may be retained in the same position without a plan for remediation only if the principal was in that position for no more than two years before the school is identified as low-performing." The "low-performing" designation is assigned to schools whose state end-of-grade or end-of-course test scores fall below state established criteria. This statute significantly increased the pressure on principals to improve the performance of their students on state developed assessments and to improve the performance of teachers who are primarily responsible for student performance.

The accountability movement in North Carolina coincided with legislation that moved principals from employment as tenured employees to employment as contract employees. NCGS 115C-287.1 required that beginning July 1, 1995, all persons employed as school administrators shall be employed by contract with a local board of education "for two to four years." This statute further provided that "an initial contract between a school administrator and a local board of education...may be for a period of less than 12 months provided the contract becomes effective on or before September 1. A local board of education may, with the written consent of the school administrator, extend, renew, or offer a new school administrator's contract at any time after the first 12 months of the contract so long as the term of the new, renewed, or extended contract does not exceed four years. Rolling annual contract renewals are not allowed." This legislation enabled local superintendents and boards to more easily non-renew principals.

Under this legislation principals were protected as if they were tenured employees during the period of the contract. The statute provided that "the school administrator shall not be dismissed or demoted during the term of the contract except for the grounds and by the procedure by which a career teacher may be dismissed or demoted as set forth in G.S. 115C-325." The statute further provided that the superintendent's "reasons may not be arbitrary, capricious, discriminatory, personal, or political." The decision not to renew a principal's contract was also subject to judicial review in accordance with Article 4 of Chapter 150B of the General Statutes. The fact reminded, however, that the principal was under more pressure to improve their schools since the enactment of NCGS 115C-287.1. Since school improvement in North Carolina has been defined by student performance on state tests, principals were under added pressure to improve teaching in their schools.

The principal's duty to support teachers in the improvement of instruction and to evaluate certified employees was stated in NCGS 115C-288. In addition, principals in low-performing schools were required to "develop action plans (established under G.S. 115C-333) and...monitor an employee's progress under an action plan." This legislation clearly stated that the principal was responsible for the improvement of teaching and for working with teachers to improve instruction in the school.

In response to feedback from principals and other school administrators as well as data on the termination of teachers who had obtained tenured status, the General Assemble enacted legislation that facilitated the documentation of inadequate performance. Inadequate performance was listed first among the reasons for which a career (tenured) employee could be dismissed under NCGS 115C-325 prior to the passage of accountability legislation. The expedited documentation of inadequate performance was written into statute with the passage of NCGS 115C-333. This statute addressed the evaluation of teachers in low-performing requiring that "school administrative units shall evaluate at least once each year all certified employees assigned to a school that has been identified as low-performing, but has not received an assistance team." Further the evaluation was required early enough in the school year to provide adequate time for the development and implementation of an action plan if a teacher was required to have one under this statute. NCGS 115C-333 required an action plan under the following conditions:

> " If a certified employee in a low-performing school receives an unsatisfactory or below standard rating on any function of the evaluation that is relate to the employee's instructional duties, the individual or team that conducted the evaluation shall recommend to the superintendent that: (i) the employee receive an action plan designed to improve the employee's performance; or (ii) the superintendent recommend to the local board that the employee be dismissed or demoted. The superintendent shall determine whether to develop an action plan or to recommend a dismissal proceeding. Action plans shall be developed by the person who evaluated the employee or the employee's supervisor unless the evaluation was conducted by an assistance team or an assessment team. If the evaluation was conducted by an assistance team or an assessment team, that team shall develop the action plan in collaboration with the employee's supervisor. Action plans shall be designed to be completed within 90 instructional days or before the beginning of the next school year. The State Board shall develop guidelines that include strategies to assist local boards in evaluating certified employees and developing effective action plans within the time allotted under this section."

This legislation also allowed local boards to adopt policies for the development and implementation of action plan for employees who are not working in low-performing schools. This local policy was to address certified teachers who received below standard or unsatisfactory ratings on an evaluation who where not dismissed, demoted, or non-renewed. If employees working under action plans had not improved their performance enough to receive a rating of satisfactory or better, the superintendent was empowered to recommend that the employee be dismissed or demoted. Further, the statute provided that the results of the second evaluation constituted substantial evidence of the employee's inadequate performance. Regarding the definition of inadequate performance, NCGS 115C-325 provided that consideration was to be given to regular and special evaluation reports prepared in accordance with local policy and with standards adopted by the local board.

Methodology

This research was designed to learn more about how North Carolina's accountability legislation and policies have impacted the North Carolina principals in their role as a teacher evaluator. Specifically the research was designed to answer the following questions:

- How did local educational agencies (LEA) respond to the requirement to create policy to govern the creation of action plans for teachers in their schools that are not classified as low-performing?
- Are principals using action plans in eastern North Carolina?
- How have principals been prepared to write action plans in eastern North Carolina?
- Do principals feel that action plans are useful tools that assist them in their efforts to improve learning in the school?
- What are the potential legal implications for principals using action plans?
- What are the implications of legislative and policy initiatives aimed at improving student performance for principal preparation programs?

This research was conducted through a telephone survey of North Carolina LEA's, interviews with select principals who have used action plans, and a survey of 57 eastern North Carolina principals. In addition, telephone interviews were conducted with officials at the North Carolina Department of Public Instruction, at the North Carolina Association of Educators, and with attorneys involved in the action plan litigation and professional development. The ability to generalize this research is limited by the fact that it only deals with legislation and policy in one state and with principals in one region of that state. Students participating in an education law class at East Carolina University in fall 2002 identified the principals surveyed.

Findings

How did local school boards respond to the requirement to create policy to govern the creation of action plans for teachers in their schools that were not classified as low-performing? Through a survey of all school boards and a review of the policies created in response to NCGS 115C-333, it was discovered that the policies created by 111 of the 117 boards were exact duplications of a model policy developed by the North Carolina School Board's Association. Five of the other local policies included only minor changes to the model policy. The lone remaining policy included more changes, but was essentially the same as the model policy

Are principals using action plans in eastern North Carolina? The fall 2002 survey revealed that 100% of the principals were aware of the legislation requiring them to write an action plan for any teacher who was evaluated as below standard or unsatisfactory. Surveys conducted prior to 2002 had revealed that less that 100% of principals were aware of requirements embodied in NCGS 115C-333. When asked if they had written any action plans, 38 of the 57 (65%) principals surveyed indicated that they had written at least one action plan. Principals with more experience reported that they had written action plans less than those with eight or less years of administrative experience. Only 42% of the principals with more that eight years of experience reported that they had written at least one action plan. The principals with eight or less years of experience reported that 77% of them had written at least one action plan.

How have principals been prepared to write action plans in eastern North Carolina? In responding to the survey question asking them if they had had any professional development on writing action plans, 16 (28%) reported that they had had none. Research into the professional development that has been provided for principals to prepare them to write action plans revealed that local school boards and superintendents had depended on attorneys to develop and deliver training on writing action plans. One Raleigh based law office, provided a majority of the training in eastern North Carolina. The training that was delivered in eastern North Carolina, regardless of the developer, all addressed the specific steps to be taken in writing an action plan. Those steps included the following: identify the problem, list clear goals, list specific strategies to be followed, identify the manner in which evidence will be collected, and establish a time line for the completion of a plan.

Do principals feel that action plans are useful tools that assist them in their efforts to improve learning in the school? When surveyed about the usefulness of action plans to improve learning in their schools, most of the eastern North Carolina principals surveyed (82%) reported that they thought action plans were useful tools. Only 2 (3%) of the surveyed principals felt that action plans were not useful and 8 (15%) were uncertain about their usefulness.

What are the potential legal implications for principals using action plans? The potential legal implication for principals using action plans include the all the implications associated with teacher valuation and employment that existed in North Carolina prior to the passage of NCGS 115C-333. The possible implications associated with evaluation and employment action linked with the use of action plans revolve around possible challenges to the use of action plans in general and the events associated with employment action in which action plans are used. As reported in the December 9, 1998, issue of *Education Week*, "the first teachers to be fired under North Carolina's 2-year-old accountability program (fought) their dismissals and, in the process, (provided) an early illustration of the struggles that may lie ahead as states push administrators and teachers to take more responsibility for student achievement (*NCAE News Bulletin*)." These teachers were members of the North Carolina Association of Educators (NCAE) who supported them in this litigation. In the *Education Week* article, the NCAE executive director stated, "I think we are going to get into even more legal battles about property rights between state and local officials." The article also reported, "North Carolina may be the first state to fire a teacher under its performance-based accountability program…." This case was settled when one of the teachers retired and the other was given a non-teaching job in the district. No litigation has occurred since 1999. The 2002 survey of principals asked principals if they felt that their superintendents supported the use of action plans and if they thought the action plans were useful tools to improve learning in their schools. Only one principal reported the superintendent did not support the use of action plans. Two other principals reported that they did not know if the superintendent supported the use of action plans or not. Regarding their feelings about the usefulness of action plans, 82% of the principals indicated that they felt they were useful tools in improving learning in their schools.

None of the surveyed principals reported that they had been involved in any legal action as a result of the use of an action plan. Seven principals (7) reported that legal action had been threatened. Interviews with selected principals revealed that action plans were generally used with teachers who were within the first five years of their career or teachers who were nearing the end of their career. North Carolina beginning teachers were not tenured until the completion of their fourth year. Unless a principal felt that a non-tenured teacher must be terminated during the contact year, there was no need to write an action plan. Veteran teachers who were near retirement, however, generally had obtained tenure. The interviews with principals revealed that teacher who threatened legal action as a result of an action plan noted harassment and age discrimination as concerns.

Summary and Implications

This research attempted to discover how legislation and policy initiatives in North Carolina had impacted principals as teacher evaluators and in employment actions. One of the most interesting findings was how local school boards developed the policy that would guide how action plans would be created for teachers who did not work in low-performing schools. Most of the action plans written in North Carolina were for teachers who did not work in low-performing schools. The fact that this policy followed the model created by the state's school board association seems to indicate that the association may have significant influence over the creation of local policy. Further study of how closely association model policies are followed by local boards would show the extent of the association's influence.

The use of action plans has increased over the past three years. Surveyed principals and superintendents feel that action plans are a useful tool that they can use to improve the quality of instruction in a district's schools. This indicates that action plans have become an accepted method for dealing with the pressure school administrators feel to improve learning in schools as measured by the state's testing program. The absence of litigation since the initial court challenge to using an action plan to terminate an employee may have created a sense of security that has lead to increased use. Continued action by NCAE representatives who intervene when teachers are place on action plans and the possibility that action plans can be used to terminate teachers on grounds that are protected by statute or the Constitution reveal the need for caution. The 2002 survey of principals revealed that principals who are early in their administrative careers were more likely to write an action plan than principals who had more than eight years of experience. The implication of this finding is principal preparation program have a duty to equip their students an updates understanding of the legal implications of current and future litigation impacting the practice. It also indicates a need for preparation programs to examine the manner in which they prepare students to work with teacher to improve their performance.

This research had a number of limitations. Those limitation could be addressed though future studies that include a larger sample size. A sample that surveyed principals from across the state would allow these findings to be tested against principals' perceptions from other regions of the state. A study that examines how accountability has impacted teacher evaluation and employment across the nation would put the North Carolina program in perspective. With the enactment of the "No Child Left Behind Act," it seems evident that testing and accountability will be issues well into the future.

References

Coleman, J., Campbell, E., Hobson, C., McPartland J., Mood, A., Weinfeld, F., & York, R., (1966). *Equality of educational opportunity.* Washington, DC: U S Government Printing Office. (ERIC Document Reproduction No. ED 012275)

Haller, E., & Kleine, P., (2001). *Using educational research: A school administrator's guide.* New York: Longman.

N.C. teachers battle state over firings. (1999, February). NCAE News Bulletin, 13, 8.

Angela Maynard Sewall, Ed.D.
Professor
Department of Educational Leadership
University of Arkansas of Little Rock
2801 South University Avenue
Little Rock, AR 72204
(501) 569-3267/FAX (501) 569-8694
e-mail: amsewall@ualr.edu

Kathy Balkman
Assistant Professor
Henderson State University
100 Henderson Avenue
(870) 230-5213/FAX (870) 230-5029
Arkadelphia, AR 71999-0001
email: balkmak@hsu.edu

48th Annual Education Law Association

November 14-16, 2002

Do Special Education Teachers Leave Their Rights At The Schoolhouse Door?

The old adage "never assume anything" has particular moment as we reflect about freedom of speech and the legal precedents that have led to constant honing by the Courts of what the balance might be between rights and the needs of the workplace. Each time that a major case is decided on the topic of free speech, there is a tendency to be lulled into a sense of closure. After all, we have the Connick case, the Pickering test and Mount Healthy to guide us. However, several recent cases involving special education teachers demonstrate that the school house door is still open and redefinition of what rights a teacher brings in that door are on-going as they relate to public and private speech.

Speech and Precedent

In Mount Healthy School District v. Doyle (429 U.S. 274) (1977), the Supreme Court heard the case of a non-tenured schoolteacher on the issue of freedom of speech. Several applicable points of law that touch the focal cases in this paper arise in Mount Healthy. The court, in Mount Healthy, established that a school employee must show that his expression is protected and that the protected expression (speech) was a motivating factor and a substantial factor in the decision of the school board to act to discipline the teacher. In fact, the court clearly noted that it was up to the teacher to show that his speech was constitutionally protected and that this conduct was the reason why he was not rehired. Protected speech may be framed by the question of whether or not the speech in question disrupts the orderly processes of the school. In fact, in the Mount Healthy case, it was also noted that if Doyle did demonstrate these facts, then the school board would have to show by a preponderance of evidence that it would have reached that same conclusions and acted in the same way absent the protected conduct (at 287)

In another familiar speech case, Pickering v. the Board of Education (391 U.S. 563) (1968), the Supreme Court had ruled that a teacher's exercise of his right to speak on issues of public concern may not be the reason for the teacher's dismissal. The court qualified this statement; however, by adding the qualifier that the proven existence of false statements recklessly made by the teacher would preclude that protected exercise. (Zirkel p. 70). The Court reiterated that the teacher's right to speak on issues of public importance could not furnish the basis for dismissal of that teacher. In fact, the Court noted that public school teachers may not constitutionally be compelled, as a condition of retaining their employment, to relinquish the First Amendment rights that they would otherwise enjoy as citizens to comment on matters of pubic interest in connection with the operation of the public schools in which they work (U.S. Digest Lawyers Edition, Headnote 2 _ 925). The Pickering case, also established a balance test, generally used by the courts in cases of free speech rights, noted in multiple cases subsequently, that of balancing the free speech rights of the teacher against the maintenance of discipline, harmony, and efficiency within the school environment. Once again the Court raised the issue of legitimate public concern (at 572). The Court also stated: there is no occasion furnished by this case (Pickering) for consideration of the extent to which teachers can be required by narrowly drawn grievance procedures to submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public (footnote 4) Both of these positions delineated by the Court are applicable to the cases in question in this paper.

In 1982, the case Connick v. Myers, 461 U.S. 1684, was appealed to the Supreme Court from the Fifth Circuit. In this case, a state government employee was discharged for the distribution of a questionnaire concerning internal office affairs. The Court held that the discharge did not violate the First Amendment since the subject matter of the survey was not protected free speech and served to impede the efficiency of the office. The speech was judged to be in regard to private not public matters and had a negative impact on office morale. The balance of interest in regard to free speech relates to the governmental interest in effective and efficient conduct of responsibilities in the office and to the public. Hence, the employer was not required to tolerate actions that would disrupt that efficiency and undermine his authority. The bottom line is that matters of private concern are not protected in the work place as first amendment free speech.

In the case Rankin v. McPherson, 483 U.S. 378 (1987), a public employee in a constables office was fired for a private expression of hope that the President would be assassinated. In the appeal of the fifth circuit decision, the Supreme Court noted once again that the determination of whether a public employer has properly discharges an employee for engaging in speech requires a balance between the interest of the employee, as a citizen, in commenting on matters of public concern, and the interest of the public employer in promoting the efficiency of the public services it performs through its employees It was held that the employees free speech rights had been violated by the discharge since the comments came in the context of a discussion of the presidents policies and was not intended as a threat. the inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern (Pp. 384-387).

A key distinction in regard to all of these cases as well at the three under close scrutiny in this presentation, Fales, Khuans and Settlegoode, is whether the speech is job related, part of the job or unrelated to the job. (Wells, p. 22)

Current Legal Developments

The problem of balancing freedom of speech against the governments interest is compounded in the school setting. The School is, indeed, a government agency but one with particular responsibilities and concerns. As noted by Wells (p. 1) courts are persuaded by the argument that, in these (governmental sic)) organizations, respect for hierarchy and a high capacity for teamwork is vital for effective performance Therefore other questions and contexts must be considered. Of course, the facts of the case present that special context for consideration. Still the Courts have been reluctant to state a general rule favoring either the state or the individual in this area (Wells, 2)

The issue is compounded when there is damage to one of the parties; for example, in the case of retaliation for the exercise of free speech and that damage or redemption thereof falls within the aims of section 1983 thereby blunting the issue of immunity for the state. Several cases touch on this issue as well as the issue in Settlegoode, Khuans and Fales.

In Hughes v. Whitmer, 714 F.2d 1407 (1983), a state trooper was transferred to a different district in the Missouri Highway Patrol. The trooper alleged that his first amendment rights were violated because the transfer was in retaliation for protected free speech activities in which he had engaged. The speech related activities in question was in regard to friction between two troopers and the troopers comments about a fellow officer and that officers sons alleged illegal activities. The question for the district court was whether or not the transfer was a disciplinary action and, if so, whether or not a hearing should have been required prior to carrying out the transfer. The court notes, on appeal, that the question of property interest was also involved and whether an employers historical practices and conduct which rise to the level of a common law of the employment relationship that both parties recognize (Perry v. Sinderman, 408 U.S. at 602) a property interest. The court found that there is specific power granted to the Superintendent in Missouri to transfer troopers at his discretion. Missouri statutes obviated the issue of property interest not in a position but to a particular permanent assignment. The statutes also provide that a member of the state troopers has no interest requiring protection in a pre-disciplinary hearing unless the members removal is recommended. Neither was his liberty interest implicated as Hughes failed to show injury to his reputation by such a transfer. Although this is not a teacher/school case, the issues of liberty and property interest have bearing on the cases that are central to this presentation.

In 1983, the Eighth Circuit Court of Appeals heard McGee v. South Pemiscot School District, 712 F.2d 339. This was the case of a schoolteacher who brought action under 42 U.S.C. _ 1983 after losing his job. The claim was that the school district fired him for a letter he had written to the local newspaper editor. The question was whether his conduct was protected. The jury in the court of original jurisdiction found that the non-renewal of the contract was motivated by protected conduct under the First Amendment. The Court of Appeals, however, that although citizens do not lose all of their First Amendment rights when they become public employees, the state does have an interest in regulating free speech. A balance must be reached therefore. While a school board generally may not dismiss an employee for criticizing school policies that are of public interest, the issue of harmony in the workplace and interference with the operations of the schools were considered.

While the District Court found that the letter was not the motivating factor for dismissal of the teachers, the Appeals Court noted that the plaintiff bears the burden of showing that the conduct (writing the letter) was the motivating factor in the school boards non renewal decision. The Appeals Court also noted that the jury had found otherwise and remanded the case to the District court for judgment in line with the jury decision.

In 1983, the Eighth Circuit also heard the case Bowman v Pulaski County Special School District, 723 F.2d 640. In the Bowman case, another 42 U.S.C. _ 1983 claim was made alleging that tenured non-probationary teachers were involuntarily transferred due to their public statements to district patrons concerning the administration of corporal punishment by a colleague even though each acknowledged that he had not actually witnessed the administration of discipline. The court delineated a three-step analysis needed to determine whether or not the first amendment rights of a public employee have been violated. These are:

1. Analysis of whether the plaintiff has demonstrated that he is engaged in protected activity.

2. Whether or not the protected activity was a substantial factor in the actions taken against the plaintiff.

3. Whether the defendant has demonstrated that the same action would have been taken absent the protected activity, thereby overcoming the plaintiff's claims.

A mitigating factor in this case was noted by the Court was that there was public interest in the subject of the speech. The time, place and manner of the speech as well as its context were also considered by the court. Finally, the court raised the question of whether the speech impeded the appellants ability to perform their duties and found that no evidence that this was the case. The court therefore concluded that the appellants speech was protected and that involuntary transfers can be as effective as discharges in chilling the exercise of first amendment rights Accordingly, the teacher prevailed.

In Sexton v. Martin, 210 F.3d 905 (2000), the Eight Circuit Court of Appeals again dealt with questions of free speech rights and the efficiency of the workplace. In this case, the question of qualified immunity on the part of the employer, the city of Des Peres, Missouri, was raised. Sexton had allegedly been terminated in retaliation for the exercise of first amendment rights. To determine qualified immunity, two steps are necessary. First, the court must ascertain whether or not an assertion of the violation of constitutional rights has been made and secondly, whether the constitutional right was clearly established at the time of the termination of the employee. Once this determination is made and the Pickering balance test is applied, a determination can be made as to whether or not constitutional rights were impaired and whether damages are warranted. In either case, sufficient evidence must be proffered to warrant the decision of the Court and the positions of the parties to the case. Qualified immunity would be an entitlement if the actions taken by the employer were objectively reasonable in light of the clearly established law and facts know by him at the time of his actions and the true basis for those actions, i.e. speech or behavior.

Other cases including Belk v. Eldon, 228 F.3d 872 (2000), McGill v. Board of Education of Pekin Elementary School District No. 108, 602 F.2d 774 (1979), Smith v. West Memphis School District, 635 F.2d 708 (1980), and Porter v. Dawson Educational Service Cooperative, 150 F. 3d 887 (1998) deal with issues of free speech, employer efficiency and retaliation in the form of transfer or discharge. In each case, the Courts reviewed issues similar to those previously discussed.

Teacher Property and Liberty Interests

The issues of property interests in employment as a teacher is often predicated on the language contained in state codes as to when a teacher is recognized as tenured or non-probationary. In several states, this is the point at which a teacher receives a standard teaching license. At that time, the contract cannot be non-renewed. Therefore, if a teacher is not to continue working at a district, termination for cause is the path that must be pursued by the

school district administration. The recognized bases for termination for cause generally are incompetence, grounds related to in-school behavior and performance of duties other than actual teaching (school citizenship) (Imber & Van Geel at 359), incapacity, unfitness or posing a threat to students.

Even a tenured teacher does not have property interest in teaching a particular grade or at a particular school or even in a subject provided he or she is licensed to teach the assigned grade and/or subject.

Liberty interests extend to the right of a teacher to maintain his or her reputation, the good name. Liberty interests also protect the due process rights of a teacher in the event of disciplinary action on the part of the district.

Ethics and Legal Responsibilities of School Personnel

Taking these cases as precedent, the issues of Settlegoode, Khuans and Fales can be more meaningfully examined only after due consideration of the legal and ethical principles on which school administrators and special education teachers are expected to operate. There can be no question that special education teachers, due to the very nature of their specific job responsibilities, may find themselves in an awkward and/or uncomfortable situation when the issue of freedom of speech arises. To understand these unique job responsibilities, established by contract with a board of education, one must briefly review three federal laws that require, either directly or indirectly, local school districts to provide special education services for students with disabilities.

The first of these, The Individuals with Disabilities Education Act (IDEA), was designed to:

" assure that all children with disabilities have available to them ... a free appropriate public education which emphasizes special education and related services designed to meet their unique needs, to assure that the rights of children with disabilities and their parents or guardians are protected, to assist states and localities to provide for the education of all children with disabilities, and to assist and assure the effectiveness of efforts to educate children with disabilities." (IDEA, 20 USC Section 1400 (c)).

To fulfill the mandate of IDEA each state, and, then by reference, each local school district must establish procedural protections, which are the policies and procedures that guarantee that all students with disabilities have this right to a free and appropriate public education (FAPE). Each state and local school district must also ensure that procedural safeguards, designed to protect the rights of children with disabilities and their parents, are in place. These procedural safeguards are to ensure that parents have opportunities for meaningfully participation in all decisions regarding their child's special education program. Examples of these procedural safeguards include:

Notice must be given to the parent before the school district initiates, changes, or refuses to initiate or change identification, evaluation, or placement decisions. This notice must be given within a reasonable time frame allowing for the parent to fully participation in the decisions.

Written parental consent must be gained prior to a preplacement evaluation and initial placement in the special education program. This consent can be withdrawn at any time by the parent.

Parents must be given the opportunity to examine all school records on their child.

The substantive right of FAPE addresses the special education program which consists of special education, defined as specially designed instruction and related services, and any developmental, corrective, or supportive services that students need to benefit from their special education program. These instructions and/or services are to be provided at no charge to the parent/guardian and must meet the unique needs of each child with a disability. All services must comply with the standards established by the state educational agency (SEA) and must include appropriate preschool, elementary and /or secondary school education. These instructions and/or services are to be documented and provided through the individualized educational program (IEP), which is written during a conference composed of a group of persons, including the parent, who have knowledge of the child.

Section 504 of the Rehabilitation Act of 1973, as well, provides a FAPE mandate for children who have disabilities. Section 104.33 (a) states:

"a recipient of federal funds that operates a public elementary, or secondary education program shall provide a free and appropriate public education to each qualified handicapped person who is in the recipients' jurisdiction regardless of the

severity or nature of the person's handicap." (Section 504 Regulations, 34 C.F.R)

These regulations clarify that an appropriate education is one that consists of regular or special education and related services designed to meet the individual educational needs of that person with the disability as adequately as the needs of those who are do not have disabilities are met. The issue at stake is one of comparability. In other words, services that are provided to students with a disability must be as comparable as those provided to those without a disability. These services are to be provided through a plan, sometimes called an Accommodation Plan, that documents such required services.

Section 504 further stipulates that this education and necessary services are to be provided in accordance with specific procedures. Specific procedural safeguards are required in all school actions and decisions that address the identification, the evaluation, or placement of a student that has a disability. These specific safeguards are:

Notice of school actions

Opportunity to examine relevant records

Impartial hearing for resolutions of disagreements

Review procedure for resolutions of disagreements (Section 504 Regulations, 34 C F.R. Section 104.33 (b)).

The American with Disabilities Act (ADA) does not have a specific FAPE mandate or standard. Office of Civil Rights (OCR) holds that ADA , though, does have a FAPE standard through Section 504. The right to FAPE, which exists through the non-discrimination requirement of Section 504, applies then to all state and local governments, entities and agencies and to private schools systems. (Yell, 1998)

Special education teachers and administrators have not only a legal and contractual base for the provision of FAPE but an ethical consideration as well. Often times, it is the special education teacher who must serve as the advocate for the delivery of appropriate services and to ensure the procedural safeguards for children with disabilities and their parents are implemented. This difficult and complex role of advocate is grounded, not only in preservice training, but as standards of ethics for professional organizations. One such organization, The Council for Exceptional Children (CEC), has an established and approved Code of Ethics which holds, among other things, that:

A. Special education professionals are committee to developing the highest educational and quality of life potential of individuals with exceptionalities.

B. Special education professionals promote and maintain a high level of competence and integrity.

C. Special education professionals engage in professional activities which benefit individuals with exceptionalities, their families, other colleagues, students, or research subject.

D. Special education professionals exercise objective professional judgment in the practice of their profession.

E. Special education professionals work within the standards and policies of their profession.

F. Special education professionals do not condone or participate in unethical or illegal acts nor violate professional standards adopted.

The National Association of Elementary and Secondary Principals (NAESP), in its statement of ethics, indicates that all administrators should subscribe to the following standards in addition to others not listed herein:

1. Make the well being of students the fundamental value in all decision making and actions.

2. Fulfills professional responsibilities with honesty and integrity.

3. Supports the principle of due process and protects the civil and human rights of all individuals.

4. Obeys local, state and national laws.

5. Implements the governing board of education's policies and administrative rules and regulations.

6. Pursues appropriate measures to correct those laws, policies and regulations that are not consistent with sound educational goals.

In light of the legal mandates to provide FAPE, or special education and related services, school districts will assign to building administrators and special education teachers the day to day responsibility of ensuring these required services per the IEP or Accommodation Plan and the necessary safeguards are provided. By being on the front line, it is often the special education teachers who recognize that these appropriate services are not being provided or that the procedural safeguards are not being implemented as required. These teachers may find themselves in that proverbial hard spot. Acknowledge the lack of services to the responsible administrator and/or parent which could then result in strained working relationships or even termination of their job. Or, do not speak out on the non-delivery of services or procedures, accepting that FAPE has been denied to the child. This denial could result in a potential due process hearing or court action.

Parental Recovery of Damages Under IDEA

Of particular interest are the cases Doe v. Withers, Civil Action NO. 92-C-92 (Circuit Court of Taylor County, West Virginia), W.B. v. Matula, 67 F.3d 484 (1995) and Whitehead v. Hillsborough, 918 Fed. Supp. 1515 (1996). In each of these cases, parents alleging a failure on the part of the school district to provide adequate and appropriate services to a child with a handicapping condition recovered either damages, or in the Whitehead case, actual costs borne by the parents in regard to the child's education. The interesting point is that although IDEA was not intended to be a vehicle for the recovery of damages by parents, there is precedent for awards of damages and costs to families even in the absence of constitutional issues.

Settlegoode, Khuans and Fales

In the case of Settlegoode v. Portland Public Schools, CV-00-313-ST (2002), Dr. Pamela Settlegoode was an adaptive physical education teacher who taught p.e. to students with disabilities in the Portland School district from 1998-2000. Dr. Settlegoode's contract was not renewed by the district for the 2000-2001 academic year. Dr. Settlegoode was a probationary teacher during the two years for which she worked in the Portland District. Dr. Settlegoode worked with several students who received services under Section 504. It was her allegation that the district intentionally did not provide appropriate equipment, facilities and scheduling for meeting the needs of these students. At one school site, the special education supervisor advised Dr. Settlegoode not to provide any services to disabled students. Dr. Settlegoode reported these allegations and alleged that her students were subject to discrimination and that they were being denied FAPE. These reports were made to the special education supervisor and the superintendent.

Dr. Settlegoode filed suit pursuant to her non renewal alleging that she was coerced into not following the intent of the Act 504 and that she was non renewed when she refused to comply with this directive and continued to report the actions of the district in good faith. She further alleged that the district non renewal of her contract was retaliatory in nature and violated her first amendment rights.

No reason was given by the district for the non-renewal , however, the district position in trial was that Dr. Settlegoode did not prove that the district would not have non-renewed her contract absent the activity in which she engaged regarding the rights of students with disabilities under Section 504. The court noted that the defendant did have a burden of articulating some legitimate non-discriminatory reason for non-renewal or in the case in which the plaintiff creates the presumption that the adverse employment decision was the product of retaliatory intent defendant may rebut this presumption by showing by a preponderance of the evidence that the adverse action would have been taken even in the absence of discriminatory or retaliatory intent (Ruggles v. California Polytechnic state university, 797 F2d 782 (1986). The Portland District attempted to demonstrate the IEP is prepared by Dr. Settlegoode were not adequate and not up to appropriate standards and that Dr. Settlegoode did not demonstrate adequate ability to teach a group of students. The court found that the district would have non-renewed Dr. Settlegoode even absent the issues of her protected activities. The jury came to a different conclusion.

The court applied the Pickering test of public concern and workplace efficiency balanced against individual liberty interests. The jury, however, found that the real issue was about accommodating the situation for teaching students with handicapping conditions. The court then examined the question of whether there was actual interest to the districts legitimate interests, if the evidence is viewed solely in favor of the defendant. Disharmony did occur in light of Dr. Settlegoode's complaints. The defendant did not complain outside of the line of authority within the district, however, and was not therefore covered under the Whistleblower Act in Oregon. Although the jury had decided that punitive and compensatory damages should be awarded to Dr. Settlegoode in the U.S. District Court, there was an apparent misunderstanding of the jury instructions is a is the jury role in determining damages. The court, on the appeal, granted the defendant school districts motions and the action was dismissed.

Although, in the final analysis, Dr. Settlegoode's claim was not found to be true as a matter or law and no settlement was actually granted, the issues of the public duty of a special education teacher, that teacher's speech rights and the needs of the district were raised in a context different from that found in most speech cases related to teacher's first amendment rights. The fundamental difference may be found in the greater duty owed by teacher and district to a student covered by IDEA or Section 504.

The other case on point is that of Fales v. Garst, 235 F.3d 1122 (2001). In Fales three teachers and their building administrator had a long history of conflicts and tension over the needs of the special education students. Principal Garst instructed the teachers they were not to discuss any incidents surrounding special education students with anyone. He questioned the instructional areas documented on an IEP and the implementation of that IEP without his approval. He later demanded that teachers could not implement any IEP's without his direct authorization. The teachers were denied by Garst the opportunity to share with appropriate faculty the special needs of a medically fragile student and a student who was considered a danger to himself and others. Garst refused, as well, for a special education student to call his father to pick him up after school was dismissed early for a weather emergency. If one of the appellees had not called the father, the student would have arrived to a locked home with no place for supervision or safety during a severe snow storm. During a medical emergency concerning a student with a severe heart condition, Garst locked 4 of the 6 emergency personnel out of the room where the student was located. By chance, one of those locked out was a volunteer special education advocate. Garst eliminated the planning period for the special education teacher, while increasing the planning time for the 5th and 6th teachers. The local newspaper published several articles on Garst's mistreatment of special education students and interference with services. Other faculty members confronted the three teachers with the conflicts, resulting in pro- and anti- Garst factions.

Garst did admit to the teachers and others that he lowered performance evaluations as a direct result of the conflicts between them. He agreed, as well, to the IDEA violations. The district court denied Garst's motion for summary judgment on the grounds of qualified immunity and found for the appellees.

The 8th Circuit Court found that the complaints did fall within the matter of public concern. Even though the facts of the case were undisputed, the court found that the effect of the public speech created school factions and disharmony among the faculty. The working relationships in the school deteriorated significantly. The court determined, as well, that Garst's ability to administer the school's program was seriously impacted. The court, applying the Pickering balance test, found that the speech was not protected and reversed the district court. Summary judgment for qualified immunity was granted.

Khuans v. School District 110 (123 F.3d 1010) (1997) focuses, as well, to this conflicting issue of freedom of speech vs. advocacy for special education services. Khuans was a school psychologist on contract with a special education cooperative that provided special education services for School District 110. She complained, in her capacity as a school psychologist, to the building administration that the school district was violating several of the procedural safeguards mandated in the IDEA. As a result, the district was not providing FAPE and was not in compliance with the IDEA. Violations of the procedural safeguards included non-delivery of services and programs established on the IEP, not giving notice to parents for conferences where special education decisions for their child were to be discussed and made, prematurely determining disabilities prior to the multidisciplinary team diagnostic data and input, and by changing the placement and services of specific students without following the required processes and procedures. Khuans also complained to the building administrator that it was difficult to communicate with her immediate supervisor, and that this supervisor was often not on campus. After ultimately meeting with the school superintendent, the assistant administrator and her immediate supervisor, Khuans was told that her contract with the special education cooperative would not be renewed. Khuans claimed that her termination was in retaliation for her complaints on the violations of IDEA.

One of the issues that surfaced in this case is qualified immunity. The district court, in response to the school 's claim for qualified immunity noted that the issue "would be best addressed at a later time when more facts have become apparent:" and denied the motion. On appeal the ruling was reversed and the court did find for the motion to dismiss the superintendent on qualified immunity. The court clarified that qualified immunity is not a release of liability, but immunity from lawsuits. It is an issue for appeal, based solely on a matter of law, if a case by error is allowed to go to trial.

The issue of independent contractor comes through the court's decision on qualified immunity. The status of Khans' position as an independent contractor was unclear and muddied the issue of qualified immunity. When Khuans was terminated, the 7th Circuit had not yet addressed or clarified whether independent contractors could be terminated for speaking out on wrongdoing. The appellate court held that protected speech was not governed by pre-existing law. Thus, the superintendent could not have reasonable known he was violating the First Amendment when he became a party to the termination.

The other issue at stake focuses to the claim of retaliation for speaking out on the violations of IDEA. The appellate court agreed with the district court that the Khans' public complaints of the district's violations of IDEA were protected. The court also agreed that it was in the best interest of the public to make public the potential or actual wrongdoing. Unfortunately, Khuans' complaints also addressed a conflict with her supervisors, which is seen as private employment concerns. In fact, the court found that the few complaints concerned with IDEA violations were just a small part of the whole matter. The district court, affirmed by the appellate court, found that her comments and complaints did not fall under protected speech due to their form, context and effect. The court found that her complaints actually resulted in a disruption of the daily workings of the special education program.

Advocacy vs Unprotected Speech

Special education teachers can advocate for their students with protected speech. Khuans shows that when special education teachers focus their complaints solely to the violations of IDEA, 504 and or ADA, protected speech under the First Amendment is possible. These teachers must walk the fine line of advocating when in making wrongdoing public. They must substantiate that the complaints are of public concern and that the public criticism outweighs any disruption to the administration of the public school system and/or it's programs. Wales v. Board of Education of Community Unit School District 300, 120 F.3d 82 (1997) tells us that one indicator of the true nature of the public criticism is to whom the statements are made. When statements are made only to a supervisor or an administrator it may be interpreted that "speaking out" is for personal gain or interests in a disagreement. If the true intent of speaking out is not for a "public call for change", but one of employment issues and concerns, the possibility exists that the speech is not protected.

Special education teachers should recognize that their efforts to advocate can be protected not only under the First Amendment but under the same three federal laws that establish and protect special education services for students with disabilities. Section 503 (a), Title V, of the ADA prohibits retaliation "when an individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding or hearing...". Section 503 also "prohibits interference, coercion, or intimidation... on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of any right granted by this Act." Section 504 and the ADA require that public schools must have written grievance procedures. These grievance procedures must provide, to teachers and others, "prompt and equitable resolution of complaints alleging any action prohibited by Section 504". Section 504 also allows for teachers and others to question the appropriateness or delivery of services under a 504 Accommodation Plan. IDEA establishes the procedure of committee review of any aspect of FAPE. (Martin, 2002)

One concern that special education teachers must address when advocating for their students is confidentiality. Both IDEA and 504 require assurances that personally identifiable information are collected, maintained, and used with strict confidentiality and available to only those who are working directly with the students. Access to records of students receiving special education services is protected as well. Access is limited to those who work directly with the student or on "an as need basis". With written parent permission, confidential information can be shared with others. The Family Education Rights and Privacy Act (FERPA) also requires special treatment to ensure the privacy of students confidential information in how it is collected, maintained, and used. (FERPA, 1974) In all three laws, it is understood that all employees of the school district will comply with the confidentiality mandate. It becomes important that special education teachers advocate and share information on lack of services or violations of procedural safeguards under the mandate of confidentiality.

Porter v. Dawson Educational Service Cooperative, 150 F3d 887 (1998) is an 8th Circuit case that addresses the issue of confidentiality. Porter, an early childhood special education coordinator, alleged that she was terminated from her position for speaking out against the release of identifiable information that would verify the submitted Cooperative's early childhood special education "child count" to the Arkansas Department of Education (ADE). Central to this case is an earlier court decision in A. B. ex. rel. B B. v. Arkansas Department of Education, No. LR-c-817 (1992), in which Porter was disposed. In A. B. the district court held that releasing confidential and identifiable information to the ADE did not violate the confidentiality mandate and complied with IDEA regulations and ADE policy. This ruling cleared the way for the Cooperative to submit to the ADE a list of children, by name, date of birth and disability which would be used as information for the Cooperative's child count. Porter, after the A. B. decision, publicized through a statewide newspaper a conflicting position concerning the release of this confidential information to the ADE and potential harm to the children. What becomes critical is that the newspaper article identified her by name, position, and employer. The director of the Cooperative first recommended a non-renewal of Porter's contract for various reasons, such as refusal to cooperate with the ADE and to release the identifiable information. He later "withdrew" the recommendation of non-renewal and recommended termination for mismanagement of the early childhood special education program.

At the district level, the jury returned the verdict in favor of Porter and awarded compensatory damages of $150,000.00 with another $300,000 for punitive damages against two of the defendants. The district court later found, as a matter of law, for the appellees stating that Porter's speech did involve a matter of public concern but that the Pickering test favored the Cooperative. The court, citing a finding from the jury, stated that Porter's speech caused or would have caused disharmony in the workplace, damaged working relationships and marred her ability to fulfill her job duties.

On appeal, the court held that Porter did not have protected speech. The first issue at stake, confidentiality of identifiable information as a matter of public concern, was not disputed. The standard from Pickering became the important issue. The court found that Porter's statements in the newspaper could undermine the authority and disrupt the operations and functions of the Cooperative. The court also found that the motive for the newspaper article was a personal with an element of self-interest. Evidence from the district trial suggested that Porter's position on the release of confidential information and her participation in the A. B. case stemmed from concern that the early childhood special education program was out of compliance and that children were being served incorrectly and inappropriately. In light of these findings, the court found for that Porter's speech was not protected.

The dilemma of advocacy as protected speech will only continue for special education teachers and others. In fact, a recent suit, Cohen v. South Coast Education Service District in Oregon looks again at the issue of retaliation and freedom of speech, but this case concerns a special education paraprofessional who repeatedly reported to her supervisors the lack of equitable services and appropriate equipment for students with disabilities. Ms. Cohen alleges intimidation, adverse transfers, increased surveillance and threats of termination as a result of her efforts to secure appropriate services for her students with disabilities. ("School district", 2001).

The question to be examined really is whether or not advocacy for students with disabilities is the role of the teacher or the paraprofessional. If so, a concomitant question is whether or not that advocacy is protected speech when the school employee "goes public" in the fact of a school district that seemingly is reluctant to follow the spirit and, in some cases, the letter of the law.

DOING BUSINESS WITH ENTREPRENEURIAL AMERICA: PROTECTING SCHOOL DISTRICT INTERESTS[1]

EDUCATION LAW ASSOCIATION ANNUAL CONFERENCE
NOVEMBER 15, 2002

Robert S. McCord
University of Nevada, Las Vegas
T. C. Mattocks
Bellingham (MA) School District
Gerald Kops
University of Nevada, Las Vegas

INTRODUCTION

The 1925 decision of the Supreme Court delivered by Justice McReynolds in *Pierce v. Society of the Sisters of the Holy Names of Jesus and Mary* (268 U.S. 510, 45 S.Ct. 571) offers a prophetic view of the rightful place of business interest in the realm of public schooling. The rejection of the exclusive right of the state to operate schools and the affirmation of the liberty rights of the business owners to engage in the enterprise of schooling resounds today in a form probably not contemplated by Justice McReynolds and his learned colleagues on the court. Nevertheless, public schools today find themselves partners with entrepreneurs who view the operation of schools as a growing opportunity to realize a fair profit to their stockholders. The often overlook the admonition by the court in *Pierce* that while the exclusive franchise to operate schools does not solely reside with the government, by and large the governmental responsibility for "reasonable regulation" of all schools has not been diminished. The lessons of *Federalist 45* echo in Madison's charge to government to ensure for the greater good of the people through exercise of the authority needed to address their changing needs. In doing so, schooling remains an important obligation of government.

The conflict over the humble enterprise of the *Society of Sisters* has evolved into a fiercely competitive cadre of publicly traded profit making enterprises with national sales forces and multimedia marketing campaigns. Regardless of the glitz, the reality is that school boards find themselves engaged in developing, approving, and managing multi-million dollar multiple-year contracts with private providers while retaining significant responsibility for ensuring that the rights of students attending schools run by entrepreneurs are met. The skills required reside outside of the experience of many who have long exercised exclusive control over the enterprise. This paper attempts to benchmark those factors important for school districts to consider in doing business with private profit making providers. In addition, it endeavors to highlight the elements of contract law pertinent to the formal agreements between school districts and its private providers. Finally, reflections are offered on the implementation of such agreements and the translation of contract language and political intent into operational terms.

---

[1] The comments and suggestions of the presenters are not offered as a legal advice or substitute for legal counsel. Those considering engaging a private manager for public schools should consult legal counsel

BENCHMARKS

Whether cajoled, forced, or genuinely committed to the prospect of turning over control of a public school to a private provider as a contract for services or charter conversion, the realities associated with the process involved are formidable. We have studied the early stages of the process and have come away having learned some important lessons[2].

- *Care must be taken to control the spin of public opinion.*

Brief Discussion: Too often boards limit their policy-level discussion of privatizing to the private provider without first engaging the community in a well-planned and carefully executed public information campaign. There is ample evidence of the negative consequences to those who fail to first engage their community in the discussion of the potential benefits of privatizing. Public sentiment data repeatedly demonstrates that the public is skeptical of the reform actions of school boards and holds them to a strict standard of open and interactive governance as a condition of broad community acceptance.

- *Building support for reform efforts is an incremental process requiring a constant flow of factual information, anecdotal evidence, and independent research findings.*

Brief Discussion: Support for privatizing the operation of schools must be built on fact-laden information and reliable anecdotal evidence. Unfortunately, many of the private providers fail, as do many of the public school counterparts, to back their performance claims with empirical data and subsequently subject themselves to a lambasting[3]. In addition, they fail to capture on the benefit of anecdotal evidence as a persuasive influence.

- *The disruption to reform efforts produced by naysayers with political motives must be anticipated and merits a carefully orchestrated response.*

Brief Discussion: School boards represent the founder's hope that government close to those affected is the best form of government, yet politics are palpable in the boardroom. The adage that Speaker Tip

---

early in the process.

[2] From "Edison Comes To Town," by Robert S. McCord, 2001, *American School Board Journal*, Volume 188, Number 12, December 2001, p. 24.

[3] "Trends in Student Achievement for Edison Schools, Inc: The Emerging Track Record," by F. Howard Nelson, American Federation of Teachers, October 2000.

O'Neill coined[4] that "all politics is local" is proven in discussions of privatization of schools. Political adversaries will use the occasion to divert attention from the substance of the issue.

- *Enlightened school reform efforts use the cyclical nature of the school year to amplify and showcase the reform effort under consideration.*
  Brief Discussion: Bad news in the school business is inevitable and predictable. The often-overlooked reality is that bad news is often cyclical - recurring at the same time each year (e.g., test scores, dropout reporting). Linking a discussion on privatizing in close proximity to the bad news of test scores, e.g., is a brew for disaster.

- *The content of the bundle of reform services available is affected less by a sense of altruism and more by a profit motive.*
  Brief Discussion: Let there be no confusion, school boards are motivated by political survival and student learning and private enterprise by a profit motive and reasonable return to investors. While these need not be conflicting motivations, in low or marginal student support districts, private providers must resort to philanthropic giving to sustain profits or in the least desirable scenario - the unbundling of components of the promised instructional design. This unbundling may show itself in turnover of higher priced teachers, elimination of essential elements of the instructional program, and "cherry picking" of students.

- *Engaging in a business arrangement between government and a private profit-making enterprise requires significant due diligence into the past performance of the business, the business practices employed by that enterprise, and their capacity to deliver the contract provision services in the future.*
  Brief Discussion: There is a growing body of evidence concerning the factors leading to the failure of charter schools and private providers. Too often this information surfaces too late to resolve the problems. Yet there is much that can be learned about your private profit-making partner prior signing a contract. Too few conduct a careful investigation of the nature of the business practices and experience of their potential partner. For example, publicly owned companies are required to disclose the condition of their enterprise in the SEC 10-Q statements. The information contained in such statements often proves enlightening when weighed against claims. Much of the information is readily available, but is often overlooked by districts, and forms an essential element of the due diligence required for 7-8 digit contracts. In this day of high profile corporate failures, one would not want their dealings with a private provider to be labeled "Enronic."

- *Emphasis must be placed on beginning contract negotiations early in the process to ensure that all provisions are artfully crafted and meet with broad acceptance. This is particularly important when negotiating how those provisions affect existing labor agreements.*

---

[4] All Politics Is Local. By Tip O'Neill, Random House, 1994.

Brief Description: The American labor movement has made some of its most dramatic gains in the past three decades in the public education system of this country. There is growing skepticism among the labor movement of privatizing of schools while some evidence suggests that if labor is involved in the consideration of the operation of schools by a private entity early in the process, the potential for successful negotiations improves. The AFT has posted its concerns with Edison on the Web. Review of those materials may assist district representatives in preparation of contract provisions that guard against problems identified. ((enter http://www.aft.org/search.html) At the AFT search engine enter Edison and a number of articles are displayed.)) Further, public companies are required to make periodic filings with the Securities and Exchange Commission discussing the condition of the business and risks to its fiscal health going forward. The filings are also accessible on the web and may assist in the preparation for contract negotiation. ((http://www.sec.gov/) The second listing on the Commission Home page contains prompts to locate company documents))

- *Selection of schools is not only an exercise in gaining strong staff and community support, but represents a potentially disruptive influence on reforms already underway.*

  Brief Description: "Cherry picking" of schools is an understandable motivation for providers, yet school boards may have other needs.

- *Determination of the criteria for selecting the schools well in advance of the decision may prove to garner support for those affected including their labor representatives.*

  Brief Description: The annual *Kappan/Gallup* poll instructs us that the American public supports their neighborhood school but is less supportive of the schools in general. When one proposes an entirely new design and management of a neighborhood school, the reaction will be swift. Enlightened efforts in this regard relies on early inclusion of those influences by the privatization efforts - doing otherwise will prove detrimental.

- *Public sector, by design and as inefficient as it sometimes appears, must deliberate in the most public of forums – a practice alien to all but a few businesses.*

  Brief Discussion: Sunshine or Open Meeting Laws often prove to be a new experience for private enterprise. Deviating from open and public discussion of the privatizing of schools presents a threat to successful implementation on a variety of fronts.

CONTRACT CONTENTS

The following suggested list of contract contents assumes, of course, that any state constitutional and statutory authority issues have been resolved.[5] Further, the suggested list is not meant to exclude provisions that reflect unique issues presented in a particular environment.[6] For example, a contract to operate a district charter school would, depending on statutory requirements, require school district governing authorities, as well as charter school trustees and vendor signatures.

PROVISIONS

RECITALS / PREAMBLE

This portion of the contract is introductory. It provides an opportunity to present the statutory authority for the contract. It also may be used to offer the chronology of the actions taken by the School Board authorizing the management contract. If the Board is the agent for approving charter school applications actions regarding approval of the charter may be included in the Recitals/Preamble paragraphs

DEFINITIONS

Terms peculiar to the education setting should be identified and defined. For example, there may be a specific term used to determine the per pupil revenue system calculation in the state. Accountability system terms may also be considered for inclusion in this portion of the contract so there is no confusion regarding their use throughout the document. Statutory references of terms used should also be part of the definition

ESTABLISHMENT OF OR DETERMINATION OF SCHOOL SITES

This provision includes the designation of the school sites that are the subject of the management contract.

TERM OF AGREEMENT AND STARTING DATE

The term of the Management Contract may vary. School authorities may wish a yearly renewal term. Some state laws may prohibit long term arrangements.

---

[5] For example see Nevada State Education Association v. Clark County School District Case No. A433589, Dept. No. II, District Court, Clark County, Nevada granting summary judgment to school trustees and Edison Schools finding the vendor contract valid and enforceable.

[6] The authors wish to express their appreciation to the Denver Public School, Long Beach Unified School District, Clark County School District, Minneapolis Public Schools and Kansas City Missouri School District for their cooperation in this project

GRADE LEVELS & MAXIMUM ENROLLMENT

This provision allows the parties to express the organizational framework for the management contract at the particular school site or sites. There may be statutory restrictions regarding class size. Statutory references should accompany language.

MISSION STATEMENT

Some school districts require each school to develop a mission statement. The contract provision offers an opportunity for the Board and Manager to express their understanding of the mission of the managed sites.

> "eg. "the mission of the ------ school is to prepare a diverse cross section of ---- children for success as students, workers, and citizens by providing them with a world class education at prevailing public school costs.

GOALS, OBJECTIVES, AND PUPIL PERFORMANCE STANDARDS

This provision includes Goals of the sites managed and the relationship of those goals to the other district managed schools. There is a hidden danger here if the goals of the managed sites appear to establish a level of "superiority" that may contradict the school district's stated goal of equal access to educational opportunity. The Educational objectives for the managed sites may also be stated in specific terms. For example, managers suggest that their skill will be reflected in higher student achievement at the managed sites. The Educational Objectives may be stated in such terms. "XX school will reach higher levels of reading achievement than district schools serving comparable students etc." An Evaluation plan for the managed schools should be set out in detail. The plan should indicate the nature of involvement in the state and federal assessment process with appropriate statutory references. The plan may also identify the assessment tools to be used in making assessment decisions. (eg Woodcock Reading Mastery Test) The use of portfolio assessment may be incorporated in this provision. Pupil performance standards should be addressed. The standards may include state standards, district standards or those uniquely developed by the parties. A Timeline for achievement of pupil performance standards and plan for taking corrective action should be included in the contract. This provision offers an additional benchmark for assessing the quality of the program. Edison utilizes a Quarterly learning contract as one tool for assessing the progress of students. The district should carefully assess the learning contract mechanism to determine whether it meets district assessment requirements

EDUCATIONAL PROGRAM AND CURRICULUM

Statutory requirements impacting on the educational program and curriculum offered in the managed school should be referenced in this provision. This provision may also provide an opportunity to address the waiver of certain requirements allowed under state statutes. If such waivers are only granted to

Charter Schools in the state, there is a question whether schools managed by entrepreneurs qualify for such waivers.

The Educational program components should be addressed in the contract. How many days of instruction will be provided? The length of the instructional day should be addressed. School organizational issues may be included. (primary K-2, elementary 3-5 etc.) The staffing model used by the manager, grouping of students, technology program, second language learning opportunities, arts instruction and curriculum integration may be subject to contract provisions. Documents describing the individual program requirements may be attached to the contract as appendices and incorporated by reference. The student assessment system should also be explained in detail. For example, what role, if any, will parents be expected to play in the assessment system?

If particular curriculum and instructional materials are to be used they should be referenced and attached as an appendix. Content standards should be specified.

The School calendar should be described and incorporated in the document.

If there are specific programs for English language learners the contract should contain a provision outlining the program and materials to be used in the program referenced and attached to the document.

Will the manager assume responsibility for serving disabled students in the managed school or will the school district retain that responsibility? If the district maintains that responsibility the impact on revenue the manager is entitled to receive must be addressed.

How is the manager to handle discipline and attendance? Are school district policies applicable or is the manager free to craft its own discipline and attendance policy? Does the school district wish to require the manager to adopt special discipline and attendance policies consistent with the mission of the managed school, for example, to serve 'at risk' students? It goes without saying, although we will, that federal guidelines regarding IDEA students must be upheld.

PUPIL SELECTION AND TRANSFER

The pupil selection provision may vary depending upon the type of school that is subject to management. For example, there may be publicity and recruitment issues attendant to charter school management that are not present when a regular district school is the subject of the contract because of designated attendance areas being established.

If a charter school is the subject of the contract pupil selection may also be an issue. Are applications required? Which applications, if any, will have priority? How will non-resident applicants be treated?

How will transfer requests be considered? Will district authorities review transfer requests? Will district policy regarding transfers apply to managed schools?

FINANCIAL ARRANGEMENTS

This provision addresses the district's obligation to fund the managed school. This provision must be drafted with great care. State statutes are often complex regarding revenue provided to fund district schools. A benchmark for establishing the financial arrangements is a thorough understanding of the revenue that is needed to fund a similar district school. Once the arrangement has been finalized, an example of the calculation of revenue should be attached as an appendix to the Contract and incorporated by reference. District representatives should be mindful of the rhythm of legislative activity impacting on financial concerns and tailor the contract language to provide for adjustment based on those actions.

Per pupil revenue, State and federal categorical aid, Specific program revenue (Eg. English language proficiency act, Gifted and talented aid, Insurance issues) and others specific to the school district concerned should be identified and addressed in the contract.

A provision regarding assistance on grant applications and pledge of funds acquired through grant applications should be part of the agreement.

SERVICES PROVIDED BY THE DISTRICT

The manager will wish the district to discuss services to be provided at no cost to the manager. Those items may include the following:

- Trash removal
- School security services
- Payroll, purchasing and other business services as may be requested and mutually agreed upon
- Participation in the district's standardized testing program
- Personnel services including screening and background checks for applicants
- Food services
- Consultation related to compliance issues, including how to address the needs and support of disabled students
- Completion of required state and federal reports as may be requested and mutually agreed on
- Hearing officer for expulsion hearings and special education due process hearings
- Participation in the substitute pool

- Access to the district's on-line purchasing and pupil data systems, the staff needed to use the systems, and the software specifically needed to access these systems
- Public information systems as may be requested
- Intra-district mail services
- Access to the commodity warehouse
- Legal services related to the enforcement of the compulsory school attendance act
- Services to be provided at the district's cost and subject to availability should also be included in the contract. Examples of such items include:
- Emergency maintenance and repair of the facility
- Excursion transportation
- Use of printing services

DISBURSEMENTS BY DISTRICT

If the district is to provide a stipend for books, supplies and materials the amount and time of disbursement should specified. A benchmark would be the amount provided to each regular district school.

Schedule of financial payments

This is a key provision. Obviously, the provision should reflect the schedule that the district receives funding from state and local sources. But other considerations may trigger the district's obligation to provide revenue to the manager. Assessment reports may be a precondition to revenue obligation. The creativity of the negotiators in the unique circumstances presented by the negotiation must be considered in determining the schedule. The district may not wish to forward fund the contract. Why provide the manager the use of the money prior to delivery of the service? In some states, there is a prohibition against paying for services before they are actually delivered. What if any deduct should be made as a guarantee of promised performance?

Adjustments

The contract should include a provision for adjustments to final payment. Adjustments are addressed in state law and may provide a benchmark to issues to be addressed. Examples of such issues are as follows; (adjusted by)

- Official membership counts
- Changes in per pupil amounts received by the district
- Changes consistent with state department audit findings
- Later funding adjustment if FTE is % lower on March 1st than FTEs enrolled on statutory count day

Expenditures

A Budget of proposed expenditures by the manager should be required as a precondition for starting disbursements. A report schedule on budget expenditures should be established so that the school district has a timely reference for reviewing the fiscal status of the managed school in relation to the manager's contractual responsibilities.

Furniture and equipment

What if any district equipment will be provided to the manager for use at the managed school. Responsibility for loss or damage should be considered. Equipment to be provided by the Manager should also be addressed. For example, Edison has promised to provide laptops as part of the contract and install an intranet system between and home and school to facilitate their program. Issues regarding this equipment should be included in the contract. Ownership of equipment, responsibility for loss or damage by students and modification of managed school structure are three issues that should be addressed.

Financial audit

State statutes should provide some guidance. But remember that the district may want additional reports from the manager in order to protect district interests.

DISBURSEMENTS BY MANAGER

On occasion a manager has promised to invest its own funds in the school/s to be managed. A provision should address these issues with appropriate schedule for disbursement. Perhaps the promised investment should be a precondition for execution of the contract.

GOVERNANCE

Specific provisions regarding governance would be dependant on type of school management system that is the subject of the contract. In a Charter school operation a separate governing board may guide school governance instead of directly reporting to the school district board of trustees. State statutes will address the charter school trustee governance authority. Reference should be made to appropriate state statutes regarding the interrelationship between the charter school governance authority, manager and school district trustees.

If the contract involves a District school operation again reference appropriate state statutes regarding authority, accountability and reporting requirements.

PERSONNEL

This is an extremely important provision. The first important issue is the type of management arrangement. If a charter school is involved state law may require deferral to school district collective bargaining agreements regarding wages hours and working conditions. Each state differs in its approach to this issue. Nevada law, for example, requires charter school employment practices conform to school district bargaining agreements. Other states offer more flexibility in employment arrangements. Some states require employment of licensed personnel others provide for waiver or more flexibility. The provision should also address the status of district personnel who decide to teach in the managed school upon the termination of the management agreement or desire to transfer back to a regular district school. If the conditions of employment will be different than regular district schools negotiations may be required to address the differences.

The manager may wish to train personnel. Provisions regarding the managers responsibilities in the area should be carefully spelled out.

LIABILITY ISSUES

The contract should address liability issues. Again the type of management structure will dictate some of the language and responsibility questions. If it is a district school under management the language should address the application state statutes waiving sovereign immunity as they apply to district personnel.

PENSION BENEFITS

The handling of pension payments by school district or manger will also a subject of discussion. Consultation with state authorities may be required to avoid problems with credits and application of state law to charter schools for example.

JOB DESCRIPTIONS OF CHARTER SCHOOL EMPLOYEES OR DISTRICT EMPLOYEES SERVING IN MANAGED SCHOOLS

The unique personnel structure should be addressed and job descriptions appended to the contract so that those holding positions with the managed school are alerted to the unique aspects of the managers employment setting.

FACILITY

The site/s were identified earlier in the contract document but a specific portion of the document can be devoted to site issues. Authority and responsibility for renovation, upgrading and operation of facility should be included in the contract document. Ownership of improvements should be addressed. Access to inspect the facility to determine compliance with the agreement should be outlined. Responsibilities of the parties should the site become unusable should be specified.

SCHOOL OPERATIONS

The operational authority of the manager should be specified. This will depend on the type of management system adopted.

The nature and scope of operational authority may be specified by the charter school law. Reference to state statues may be included in this provision. Subjects such as general powers, the power to contract for goods and services, prepare a budget, select and hire personnel, purchase, lease or rent equipment and the power to accept and expend gifts or donations may be addressed in this provision.

The managers commitment to non-discrimination, open meetings law, public records law, pupil records law (FERPA other state statute) and duty to comply with policies, regulations and laws of Federal, state and district regarding school operations may be outlined in this provision.

Waiver provision reference state law

The contract should also address the ability of the manager to bind district in contractual matters

Data collection and preparation of reports should be addressed. The district may wish to have data regarding staffing, pupil enrollment, records and school operations as may be required by any government agency, court order.

TRANSPORTATION

Responsibility for transportation to and from school should be addressed in the contract. If the school district provides the service should that impact on the financial arrangements provision? If the vendor provides that should be reflected in the financial arrangements. Should the manager be free to negotiate with public or private vendor for the service?

INSURANCE

The nature and scope of the manager responsibility to provide insurance coverage must be outlined. Consideration should be given to covering costs entailed if the manager fails to perform the contract. Performance bond availability should be explored. Coordination of risk management should also be addressed in the insurance provision.

TERMINATION AND DISSOLUTION

The contract should a termination or dissolution provision. The provision should specify the circumstances and procedures for termination by the district. The clause should include material breaches of the contract but in this case might specify failure to achieve educational objectives identified earlier in the contract. Fiscal mismanagement may also be a basis for termination.

Termination by the vendor may include material breach (Non-appropriation of funds by the district) under to the terms of the contract.

There may be special terms required with regard to the notice of the ongoing relationship of the parties. For example, if minimum enrollment numbers are not met by a certain date there may be a basis for terminating the contract. Here the specific nature of the engagement and educational setting will dictate the provisions details.

GENERAL PROVISIONS

All contracts gather certain standard clauses under the general provisions heading. Provisions specifying that the written contract supercedes all prior oral discussions, a mechanism for amending the contract, law applicable to interpretation and application of the agreement and provision of Administrative audit to determine the compliance with the agreement should be considered for inclusion under the general provisions heading.

Another clause for inclusion in the general provisions section would be Notices. Specifically, how all notices required under the contract will be provided. Normally they are provided in writing and effective upon personal delivery or three days after mailing when sent by certified mail. The clause may also identify the persons and addresses authorized to accept notices.

WAIVERS

Here specific reference should be made to state law. For example, charter school laws may provide a procedure for seeking waiver of certain state laws regarding school operation. The waiver process may be described and the process for seeking a waiver outlined.

DISPUTE RESOLUTION

This is a particularly important provision. Issues will arise regarding the interpretation and application of the agreement. A procedure for resolving these issues should be outlined in the agreement. An informal process followed by a formal process should the matter remain unresolved seems appropriate. Consent to mediation should the parties be unable to resolve the issue should be considered. It may even be appropriate to consider an arbitration provision if the dispute is not resolved in mediation. A process similar to a grievance procedure may provide a starting point for considering an arbitration provision. Arbitration and mediation are preferable to costly time consuming resort to judicial authority.

CONCLUSION

This paper has attempted to identify benchmark considerations when entertaining the question of private management of public school facilities. In addition, the paper has provided a suggested list of contract provisions as a starting point for drafting the contract between public school authorities and a school management vendor. Once the contract has been executed, implementation and application issues will arise. These matters will be explored during the live session at the annual conference.

In Search of Klebold's Ghost: Investigating the Legal Ambiguities of Violent Student Profiling.

By: Merry Rhoades, Steven Rittenmeyer, Gayle Tronvig Carper

Introduction

The series of school shootings that occurred in the 1990's launched efforts of several organizations to compile and publish checklists and warning signs designed for use by schools to identify students who might be capable of violent acts. With the adoption of these checklists, schools, perhaps naively, entered the world of profiling. Though new in education, profiling has been a tool in law enforcement for many years. The authors' experience in education and law enforcement provided a basis to to analyze the application of profiling techniques in educational settings and to discuss the legal ramifications of such policy initiatives.

Profiling and Law Enforcement

The word "profiling" in a conversation with police officers causes much consternation, largely due to intense media attention in recent time to racial profiling. Once the word is out, however, the response is "Most of what we do is profiling – but not the bad kind."

The "good" kind of profiling, that is, not based solely on race, has been accepted for many years in all aspects of police work and will continue to be a necessary and effective tool. Most of the literature about profiling refers to a first use of it to understand Adolph Hitler.[1] Another famous use of profiling occurred in New York in the 1950's to identify "The Mad Bomber".[2] A psychiatrist, Dr. James A Brussel, studied the series of bombings attributed to "The Mad Bomber" and profiled the offender's age, heritage, place of residence and personality. Accounts of this incident relate that the psychiatrist predicted that the offender would be wearing a double-breasted suit with all of the buttons on the jacket buttoned.[3] The individual eventually arrested fit all characteristics in the profile, including the buttoned up jacket.[4]

Criminal profiling, often referred to as psychological profiling, is used to identify important crime scene and behavioral factors related to the offender to enable police to analyze crime scenes and apprehend offenders.[5] It is also defined as the science of reconstructing a picture or portrait of the type of crime and the criminal involved through an examination of the crime scene.[6] The FBI's definition of criminal profiling is "an investigative technique by which to identify the major personality and behavioral characteristics of the offender based upon analysis of the crime(s) he or she has committed"[7]. The theory is that once an investigator has an idea of what type of person is likely to have committed a certain crime, the investigator will focus on individuals who fit the profile.[8] Another group of authors divide profiling into three types: diagnostic evaluations, crime scene analysis and investigative psychology.[9] Diagnostic evaluations are profiles developed by psychiatrists and psychologists based on clinical practice and psychological disorders such as those found in the Diagnostic Statistical Manual.

The FBI has been involved in the second type of profiling, crime scene analysis, since 1972 and assists various law enforcement agencies through its Behavior Science Unit and its Behavior Sciences Investigative Support Service Unit. The FBI and several states have developed computerized statistical databases to enable law enforcement agencies to easily identify a criminal profile and serial trends in behaviors.[10]

The third type of profiling, investigative psychology, uses techniques of social psychology, criminology and forensic psychiatry in place of police experience or offender data.[11] This theory, developed by David Canter at the University of Surry, relies greatly on victim information to predict facts about the offender.

Profiling is used by law enforcement in many ways. The Crime Classification Manual[12] categorizes murderers into identifiable groups on the theory that the way in which a murder was committed could identify the perpetrator. In *Profiling violent crimes: An investigative tool*, Holmes and Holmes created typologies of serial murderers[13]. Profiling has been effective in hostage negotiations, threat communication, identification of serial rapists and arsonists[14] hoaxers,[15] stalkers and bank robbers.[16] Other uses include using profiles to guide police interrogations or prosecutors' cross examinations; set traps in the media to find offenders; to predict dangerousness in sentencing or parole decisions.[17]

A review of the literature shows an amazing amount of profiling done in other areas. Profiling has been done for certain types of consumers,[18] teachers,[19] graduate students,[20] people who access to the Web,[21] and computer intruders.[22] It is used in managing health care[23] and in identifying violence-prone employees.[24]

So why does profiling have a bad name? Because "good" profiling seeks a person who has committed a crime; "bad" profiling seeks a person before a crime has been committed. Additionally, there has been intense focus on actions of the police that result in disparate rates for the arrests, searches and seizures of black and Hispanic people over the past 10 or so years. Racial profiling is defined by the Department of Justice as

> "...any police-initiated action that relies on race, ethnicity or national origin rather than the behavior of an individual or information that leads the police to a particular individual as being, or having been, engaged in criminal activity." [25]

Skolnick and Caplovitz[26] contend that the "war on drugs" was used as an acceptable reason for police to stop black and Hispanic drivers. Combined with the myth that non-whites are more likely to be in the drug trade, black and Hispanic drivers began referring to this as being arrested for the crime of "driving while black". [27]

The "war on drugs" also provided the impetus for the most commonly used, and abused, profile: the drug courier profile. A drug courier profile seeks to identify criminals before an arrest is made. Heumann and Cassak[28] cite a court description of drug courier profiles as including factors as follows:

> "...arrived late at night...arrived early in the morning; one of first to deplane...one of last to deplane...deplaned in the middle; used a one way ticket...used a round trip ticket; carried brand new luggage...carried a small gym bag; traveled alone...traveled with a companion; acted too nervous...acted too calm; [...]walked rapidly through airport...walked aimlessly through airport...

This is the danger schools will encounter in the use of profiling; that the checklists being promulgated by national associations may be far too loose to be of any value.

Remedies

In the context of this paper, the Fourth Amendment freedom from unreasonable searches and seizures and the Fourteenth Amendment guarantee of due process and equal protection are at issue.

Until the U.S Supreme Court's decision in *Whren v. U. S.*,[29] a person who believed he or she was stopped while driving or riding in a vehicle because of his or her race, could challenge that stop as a pretext arrest. A pretext arrest occurs when an officer uses a minor traffic violation to stop a motorist because the officer has a "hunch", not rising to reasonable suspicion or probable cause that something else, usually drug activity, is occurring. The U.S. Supreme Court held that the subjective motives of the police officers had no place in determining whether the stop was constitutional or not. The only relevant test was an objective one: whether a police officer "could" make the stop, not whether an officer "would" make the stop. The Court further stated:

> We of course agree with petitioners that the Constitution prohibits selective enforcement of the law based on considerations such as race. But the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment...[30]

thus closing Fourth Amendment jurisprudence as an avenue to challenge racial profiling. It is extremely difficult to establish an Equal Protection violation because among other elements, a plaintiff must show that the police had a purposeful and intentional discrimination against them because of their race.[31] Some who wish to challenge racial profiling turned to the state courts.

State Response

The states of Washington, Minnesota, Arizona and Arkansas have rejected the *Whren* analysis as applying under their respective state constitutions. In *Washington v. Ladson*,[32] the Washington Supreme Court held that pretextual traffic stops violate the Washington State Constitution. Ladson, an African American, was a passenger in a car driven by Richard Fogle, also African American and the officers had heard an unsubstantiated street rumor that Fogel was involved in drug dealing. The officers, never denying that the stop they made was pretextual, eventually found a small handgun, some marijuana and $600 on Ladson after arresting Fogel for a suspended driver's license. In its opinion, the court states:

> We begin our analysis by acknowledging the essence of this, and every, pretextual traffic stop is that the police are pulling over a citizen, not to enforce the traffic code, but to conduct a criminal investigation unrelated to the driving.[33]
>
> However, the problem with a pretextual traffic stop is that it is a search or seizure which cannot be constitutionally justified for its true reason (i.e., speculative criminal investigation), but only for some other reason (i.e., to enforce traffic code) which is at once lawfully sufficient but not the real reason. Pretext is therefore a triumph of form over substance; a triumph of expediency at the expense of reason. But it is against the standard of reasonableness which our constitution measures exceptions to the general rule, which forbids search or seizure absent a warrant. Pretext is result without reason.[34]

Both the Supreme Court of Minnesota and the Supreme Court of Arizona have held that, despite *Whren*, that "the pretext factor is relevant" during searches not based on probable cause.[35] Finally, the Supreme Court of Arkansas rejected application of *Whren* stating "...[T]here is nothing that prevents this court from interpreting the U.S. Constitution more broadly than the United States Supreme Court, which has the effect of providing more rights."[36]

Another approach is shown in *New Jersey v. Soto*[37], which is a selective enforcement case and is based on the rights of equal protection and due process. In *Soto*, 17 persons of African ancestry alleged that their arrests for traffic violations resulted from discriminatory enforcement by the New Jersey State Police. Both sides in the case created a database of all stops and arrests made by the police at certain Turnpike exits during randomly selected days. The opinion goes into lengthy detail on the specifics of the database, but the court found that the defendants had established a prima facie case of selective enforcement[38] and that the State Police hierarchy "allowed, condoned, cultivated and tolerated discrimination".[39]

The question now posed is whether educators benefit from the law enforcement experience in racial profiling? Can school administrators avoid the problems associated with this practice and attain the goal of safe schools? We turn to a discussion of profiling in schools.

Profiling Clears The Schoolhouse Gate

Checklists and "Warning Signs"

Some of the first scholarly responses to the spate of school shootings during the decade of the 1990s were the publication of checklists of characteristics of the student perpetrators. The National School Safety Center (NSSC) produced a "Checklist of Characteristics of Youth Who Have Caused School-Associated Violent Deaths." The authors assert: " After studying common characteristics of youngsters who have caused such deaths, NSSC has identified the following behaviors, which could indicate a youth's potential for harming him/herself or others." Billed as an early warning signal for implementation of school safety and crisis prevention/intervention programs, the list of twenty common traits range from "(h)as previously brought a gun to school" to "(r)eflects anger, frustration and the dark side of life in school essays or writing projects." A disclaimer accompanies the checklist declaring that "While there is no foolproof system for identifying potentially dangerous students, the list provides a starting point for educators seeking to prevent student initiated violence."[40]

Contemporaneously, a joint effort between the U.S. Department of Education (DOE) and the Center for Effective Collaboration and Practice of the American Institutes of Research and the National Association of School Psychologists, produced *Early Warning, Timely Response: A Guide to Safe Schools*.[41] Section 3 of the publication, entitled "What to Look For", contains another compilation of early indicators of potential student violence. However, prior to listing the early warning signs, the report takes pains to repeatedly declare the limitations of the characteristics and to set out various preventative principles for those who use the signs. One example of these cautionary statements is: " Such signs may or may not indicate a serious problem—they do not necessarily mean that a child is prone to violence toward self or others." Another states: "(I) t is important to avoid inappropriately labeling or stigmatizing individual students because they appear to fit a specific profile or set of early warning indicators." A third admonishes: "(T)here is a real danger that early warning signs will be misinterpreted."

The Department of Education list contains sixteen characteristics compared to the National School Safety Center's twenty. Included are "social withdrawal", "excessive feelings of isolation and being alone", "low school interest and poor academic performance", "feelings of being picked on and persecuted", "patterns of impulsive and chronic hitting,…intimidating, and bullying behavior", and intolerance for differences and prejudicial attitudes".[42]

McGee and DeBernardo created a daunting, and often contradictory, list of characteristics of what they termed the "Classroom Avenger." Among the inclusionary traits are; male, physically healthy, Caucasian, middle class, "standoffish", as infants-colicky, temperamental, "delayed milestones", no participation in prosocial groups or 'normal' pastimes, interest in real and fictional violence in the media, and "somehow odd". "Classroom Avengers" are described as friendless "loners." Yet the authors present a detailed description of the avenger's "associates". But perhaps the fatal contradiction appears in the disclaimer:

> "The following hypothetical portrayal… is not based on any type of statistical or actuarial model of prediction. Instead, it is both subjective and impressionistic and it is partially informed by a limited number of cases and an equally limited amount of fragmentary data and unconfirmed anecdotal accounts derived from official police reports and the popular media…Any attempt to utilize this behavioral profile in clinical or forensic setting should be cautious and tempered with a clear understanding of the potential for both 'false positive' and 'false negative' errors of prediction". [43]

Writing in the February, 2000 *School Administrator Web Edition*, an organ of the American Association of School Administrators; Fey, Nelson and Roberts chronicled *The Perils of Profiling*."[44] The authors refer specifically to the NSSC "Checklist of Characteristics of Youth Who Have Caused School – Associated Violent Deaths" and the DOE's *Early Warning, Timely Response: A Guide to Safe Schools* behavior lists as the basis for their analysis. They first point out the inconsistency and wide divergence of the lists, as well as the lack of empirical evidence underlying the entries. Moreover, the ambiguity of items such as "excessive feelings of rejection", "tends to blame others" and "is on the fringe" are seen as immeasurable, if not unidentifiable. Thus placing any administrator seeking to use either of the lists in the unenviable position of deciding which to choose. In addition, the lack of empirical evidence underlying the content of the lists is seen as providing a basis for court challenges alleging arbitrary and capricious conduct should a student be wrongfully labeled. The authors also assert that many of the characteristics are detectable only in a setting where teachers know the most intimate details of their students' lives. With large class loads in large school settings it is impossible, they assert, to know such things as experiences outside of school, family dynamics, preferences in TV, and whether a particular child enjoys abusing animals. However, the most troubling aspect of profiling seen by Fey, Nelson and Roberts is the potential for invidious deprivations of equal protection guarantees and privacy rights. These authors conclude that the search for effective methods of violence protection must continue. For, as they declare: " If profiles were the solution to violence prevention, all prisoners would be guilty, all crimes would be solved and all future crimes would be prevented."[45]

At least two organizations have issued position statements on the validity of student profiling as a method of detecting and preventing future violence. The Center for the Study and Prevention of Violence (CSPV) at the University of Colorado-Boulder declared in a 2000 online announcement:

> "To date, no scientific research has been conducted to determine the efficacy of profiling, and evidence of the success of past profiling efforts by law enforcement has not been encouraging ...The checklists and software that are currently available do not facilitate a means of finding help and resources to address the students' needs beyond identification. There is real danger in profiling if there is a high false positive rate and no mechanism in place for acting on the early warning signs."
> "...The identification of early warning signs should not be used as a process to label children."[46]

The second position statement was adopted on July 12, 2001 by the Board of Directors, National Association of Secondary School Principals (NASSP). In a contemporaneous online announcement the organization set out its "Guiding Principles". These are:

> Student profiling unfairly labels many nonviolent students as potentially dangerous and misidentifies other "safe" students who may actually commit a violent act.
> Current profiling techniques lack the specificity needed to be effective.
> The over-identification and misidentification of potentially violent students can result in a school atmosphere that is overly fearful, distrustful, and not conducive to teaching and learning.
> Due to the high level of inaccuracy, profiling runs the risk of stigmatizing and stereotyping students and endangering their civil rights, especially the rights of those students who are viewed more "different" than "normal".

The report recommends that school principals "refrain from using student profiling as a means of identifying potentially violent students."[47]

Legal Commentary

At this writing the scholarly comment on the topic of student profiling is scarce. There are a number of articles discussing the broader topics of school safety, security and violence prevention.[48] None mention profiling. Rapp makes no mention of student profiling in sections dealing with "Apprehension and Restraint of Dangerous Students" [49] and "Creating a Safe and Welcoming School Environment." [50]

Perhaps the earliest reference to student profiling among legal commentators came from American Civil Liberties Union (ACLU) President Nadine Strossen in her keynote speech to a Drake University audience during a 1999 conference commemorating the thirtieth anniversary of *Tinker v. Des Moines Independent School District.* Referring to media coverage of school violence incidents, Stroessen stated:

> "In addition to generating unfounded fears that 'it could happen here', the sensationalized coverage tended to propel panic about all teenagers as potential terrorists-or at least all of those who wear black or favor Goth-themed Web sites, or are otherwise 'different'. In this vein, more schools are moving toward 'profiling' their students in yet another chilling parallel to a tactic that comes from the criminal justice field and has been justly condemned as discriminatory and ineffective in that context.
>
> As I and other ACLU spokespeople have constantly been reminding school officials and journalists: 'Different does not mean dangerous.' Conversely, though, stifling difference among our

nation's youth and students is dangerous-dangerous not only to their freedoms and dignity, but also to their education and to their potential contribution to their communities. "[51]

Kirk A. Bailey, analyzed the *Legal Implications of Profiling Students for Violence* as part of George Washington University's Hamilton Fish Institute on School and Community Violence effort to evaluate school violence prevention programs.[52] Bailey discusses substantive due process (validity and inclusiveness), search and seizure, equal protection and privacy/educational records issues.

Matters of general validity involve objectivity and over-inclusiveness. Citing constitutional precedent set out in cases such as *U.S. Lopez*[53] , *U.S. v. Riggs*[54] and *U.S. v. Bell,* [55] Bailey asserts that courts define an effective profile as one free of subjectivity and capable of objective application in a given circumstance. Conversely, where discretion and prejudice can be interjected the system will fail constitutional muster. According to the author, prior association of the parties compromises objectivity. Thus, for objective application of any profiling system to occur, there can be no significant or compelling personal history between teachers/school authorities and students that suggests unfairness, animosity, or favoritism. Schools are far different environments than airports, where profiling began. At the latter strangers come together in a very limited context with comparatively little opportunity or incentive for officials to interpose individual discretion or prejudice in the application of such things as drug courier profiles. The school environment is the opposite. Teachers and principals are encouraged to become as familiar with as much of their students' lives as possible.

The validity of any profiling system rests in a proper balance between accuracy and sensitivity. A valid system will accurately identify potential violators while being sensitive enough not to include individuals who do not pose a danger. Citing social science research, Bailey asserts that sensitivity decreases as accuracy increases and vice versa. Therefore, if the goal of society is to identify all potentially violent youth, interventions must be positive and educational rather than penal. Referring to the *Lopez* decision, the author declares that the greatest legal objection is that the use of profile evidence to impose punitive responses deprives the youth of rights and opportunities based on potential for violence acts rather than the act or wrongdoing itself. Something our society abhors. Therefore, profile evidence is to be avoided as a basis for deprivation of any rights or liberties. [56]

In May, 2002, the U.S. Secret Service published the most complete and authoritative analysis of the school shooting phenomenon to date. *The Final Report and Findings of the Safe School Initiative: Implications for the Prevention of School Attacks in the United States,*[57] and the companion volume, *Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates*[58] are head and shoulders above any other governmental or nongovernmental endeavor. A combined effort of the Secret Service's Safe School Initiative and the U.S. Department of Education's Safe and Drug-Free Schools Program, the report and guide studied 37 school shooting incidents in America from 1974 until 2000. The findings provide a basis for understanding and for assistance in preventing future attacks via the threat assessment method.

Chapter 3, "Findings of the Safe School Initiative", begins by characterizing the attackers. The initial finding in this endeavor is: "There is no accurate or useful "profile" of students who engaged in targeted school violence."[59] The accompanying explanation of the finding states, *inter alia*:

> " Although all of the attackers in this study were boys, there is no set of traits that described all or even most of the attackers...
> The attackers came from a variety of family situations, ranging from intact families with numerous ties to the community, to foster homes with histories of neglect...
> ...(A)ttackers differed considerably from one another in their academic achievement in school, with grades ranging from excellent to failing...
> Attackers' histories of disciplinary problems at school also varied. Some attackers had no observed behavioral problems, while others had multiple behaviors warranting reprmand and/or discipline...
> Most attackers showed *no marked change* in academic performance...prior to their attack...
> A few attackers even showed some *improvements* in academic performance...prior to the attack..."[60] (Emphasis in original)

Legal Concerns

Due Process

Student profiling programs carry the potential for penal actions such as suspension, expulsion and/or assignment to an alternative school. In such circumstances a student stands to lose the benefits of attending school.

There is no constitutional right to an education.[61] Still, the U.S. Supreme Court has repeatedly recognized the importance of education in American democracy. One of the clearest statements of that recognition came nearly half a century ago. In its landmark *Brown v. Board of Education* decision the Court declared:

> "Today, education is perhaps the most important function of state and local governments...It is the very foundation of good citizenship... In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.[62]

Though states are not obligated to operate educational systems, once the decision is made to do so and to compel children to attend, the principles due process must be obeyed.[63] The Fourteenth Amendment protects people against the state itself and all of its creatures, school boards being no exception.[64] Thus, public school students do possess both substantive and procedural rights while at school.[65] On the other hand, education authorities are vested with both the right and obligation to control student behavior that affects the orderly operation of the institution.[66] To that end schools may put into effect reasonable rules of conduct. Moreover, the Supreme Court has held that, " maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures". [67] Additionally, the need to control a variety of unanticipated behaviors which are disruptive requires that school rules not be as detailed as a criminal code.[68] Enter the substantive due process standards against vagueness.

Rules which fail to adequately articulate what conduct is proscribed do not give fair warning to those who may be affected. Moreover, vague regulations vest enforcement agents with inordinate discretion and, thereby, facilitate arbitrary, capricious and illegally discriminatory application.[69] Vagueness is considered within the context of the rule. As long as prohibited conduct is defined with sufficient definiteness that ordinary people can understand what behavior is unacceptable and in a manner that does not encourage arbitrary and discriminatory enforcement, regulations will be upheld.[70]

Therein lies the fatal problem. Profiling does not deal with conduct. It deals with *potential* conduct. Thus, public school students stand to be deprived of the opportunity to gain an education because of what someone thinks they *might* do. All notions of American justice abhor such a notion. In a clear statement, the U.S. District Court in New York declared in a case involving, so-called, "drug courier profiles":

> "...(O)ur criminal law is based on the theory that we do not condemn people because they are potentially dangerous. We only prosecute illegal acts. Putting a group of potential violators in custody on the ground that this group contained all or nearly all of the people who would commit crimes in the future would raise the most serious constitutional issues".[71]

Still, the *Lopez* decision went on to uphold the profiles used in airports by customs officials to stop and question travelers saying the, "system does not constitute a first step along the road to preventative detention of potentially dangerous classes of persons."[72] To the extent that they are used to assign those identified to alternative education settings(preventative detention) or otherwise to banish, via suspension or expulsion, student profiles conflict with this standard as well as those of substantive due process.

First Amendment Concerns

The quote, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," is arguably one of the most often quoted phrases in public school constitutional cases.[73] To justify action based upon a student's freedom of expression, a school must "show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[74] Accordingly, the wearing of a black arm band in protest of the Vietnam War cannot be prohibited unless the conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school."[75]

Fast forward to Tuesday, April 20, 1999 at approximately 11:30 a.m. where two students, dressed in black trench coats, entered the halls of Columbine High School in Littleton, Colorado with shotguns, grenades and homemade bombs and proceeded to take the lives of others located in the building. The shooters, Dylan Klebold and Eric Harris, were members of the Trenchcoat Mafia, a three-year old clique of teens. In 1998, a picture of the group appeared in the Columbine High School yearbook. Most described members of the Columbine Trenchcoat Mafia as embracing a "Goth" appearance – the wearing of all black clothing, white face paint, black eye makeup and lipstick[76]. After the events of April 20, 1999, the appearance of the Trenchcoat Mafia as well as their actions became a topic of discussion. A common query was whether the Columbine High School administration should have "profiled" members of this group as possible future assailants in an act of school violence based upon expression through appearance. Reenter *Tinker* and its progeny.

Following *Tinker* the United States Supreme Court adopted what was commonly referred to the "civility" test in *Bethel School District No. 403 v. Fraser*,[77] finding that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." This case begins the chipping away of the basic precepts of *Tinker* when it held "that the constitutional rights of students in public schools are not automatically coextensive with the rights of adults in other settings." As the Seventh Circuit noted in *Baxter v. Vigo*,[78] the *Fraser* Court "cast some doubt on the extent to which students retain free speech rights in the school setting." The *Fraser* principle was further defined in *Hazelwood School District v. Kuhlmeier*[79] by holding that a school district could censor speech that is inconsistent with the "basic educational mission". The legitimate pedagogical concern test was now born. It is within the context of the *Tinker-Fraser-Kuhlmeier* trilogy that an analysis of a possible First Amendment claim arises for the profiling of students based upon physical appearance or association with certain groups as being likely to commit future acts of violence.

Perhaps the most appropriate starting place for purposes of First Amendment implications of student profiling is with the *Kuhlmeier* decision as it is easily distinguishable for the question at hand. *Kuhlmeier* arises from a challenge to a school district's authority to exercise editorial control over a school sponsored publication. From an editorial control standpoint, the pedagogical concern test certainly has its place. It would be a stretch, however, to apply the same standard to a student that has a certain appearance and marking that student for more monitoring, scrutiny and possible discipline. Although *Kuhlmeier* has its rightful place in American jurisprudence, it does not lend itself to being applicable when considering profiling of students based upon appearance.

Some may argue that *Fraser* may be the test applied by courts. In fact, it is the *Fraser* decision that dominates the majority of cases where student dress codes are challenged. The most interesting of these is *Boroff v. Van Wert City Board of Education*[80] where a public school student was prohibited from wearing a Marilyn Manson T-shirt (commonly described as "Goth" rock performer). The front of the T-shirt contained the picture of a three-faced Jesus with a caption reading "See No Truth, Hear No Truth, Speak No Truth." The back of the shirt contained the word "BELIEVE" with the letters "LIE" emphasized. The student challenged the district's action arguing that it violated the First Amendment to the United States Constitution. The Court upheld the ban based upon *Fraser*. The court did, however, highlight the importance *Fraser* plays in the First Amendment trilogy. If the speech to be suppressed is vulgar or patently offensive, *Fraser* controls and all inquiries stop. If the speech is not vulgar or patently offensive, then the analysis must shift to *Tinker*.[81] *Fraser* may allow educators to discipline or impose rules related to speech that is vulgar or patently offensive, it is not, however, rationally related to the ultimate goal – of monitoring or excluding students based upon personal appearance. That leads us back to *Tinker*.

Tinker provides the most compelling argument on behalf of a student that s/he is somehow profiled as a student likely to commit an act of violence at the school based upon appearance or affiliation. The hallmark of *Tinker* is the "substantial disruption" test. That is, has the speech (appearance) created a substantial disruption to the school environment. This is one area that a plethora of litigation is appearing.

It is appearing in the area of school district authority to discipline for off-campus misconduct as it relates to verbal attacks on school district personnel. This analysis must necessarily begin with *Boucher v. School Board of the School District of Greenfield.*[82] Applying a "reasonable forecast" standard, the court upheld a one year expulsion of a student for the creation and distribution of an off-campus underground newspaper that detailed several hacking procedures, including how to enter the computer setup utility, access system files, and see every file and login name in the system. Although only minimal disruption occurred, the court opined that an actual substantial disruption is not the standard – merely a "reasonable forecast" standard and the likelihood of possible future disruption. Courts are, however, reticent to apply a "reasonable forecast" standard if no actual threat of physical injury or harm results.[83]

The parallels between off-campus Internet activities challenging school district authority and profiling of students based upon outward physical appearance or group affiliation is striking. The most significant difference is, however, the common thread present in the Internet cases – an actual threat or implied threat to do harm. No such strand is present in groups such as the Trenchcoat Mafia. These students are merely expressing their individuality through physical appearance or actions. If such actions create a material disruption to the educational environment, school authorities are within their purview to take appropriate action. Rather, in profiling of students based upon appearance, no rational basis between the mere appearance and any material interference (or reasonable forecast) of a substantial disruption is present. Accordingly, to apply greater scrutiny to a student based upon appearance may run afoul of First Amendment jurisprudence.

Summary

The literature and law are clear. There is no scientific or other objective evidence to support the use of profiles to penalize or stigmatize public school students. All presently available "checklists" and "warning signs" carry blanket disclaimers of accuracy from their creators and are uniformly rejected as vague, if not discriminatory, collections of guesses and stereotypes. Any application of these profiles is fraught with official arbitrariness and caprice. Supporters of profiling talk in terms of doing everything imaginable to detect and deter anyone who would become the next Dylan Klebold or Eric Harris from passing through another schoolhouse gate. Unfortunately, profiling in schools is being used in ways that go beyond the manner of use in airports. It is, or can easily become, "a first step along the road to preventative detention" of individuals or group members who are seen as different and threatening. It seems that, in many ways, we have come full circle since John Tinker, his sister Mary Beth and Christopher Eckhardt came to Des Moines North High School with their black armbands on. In those days school officials were rightfully worried that the domestic violence that was consuming American cities and colleges over the Vietnam War would also invade the high schools. In much the same way that students who dress differently or challenge authority today, school officials acting according to what was later termed an "undifferentiated fear of disturbance"," concluded that the Tinkers and Eckhardt met a "profile" and moved against them. Such a basis of action was not enough in 1969 and is not enough now. For, as Justice Fortas wrote:

"In our system state operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under the Constitution."[84]

---

[1] Egger, Steven A. *Psychological profiling: Past, present, and future*, 5 J. of Contem. Crim. J. 242 (August 1999) 243.

[2] *Id.*, at 243.

[3] O'Toole, Mary Ellen, *Criminal Profiling: the FBI uses criminal investigative analysis to solve crimes*, v6 il 44(3) Corrections Today 47 (Feb. 1999).

[4] Egger, *supra* n. 1 at 247.

[5] Warren, J. I., Hazelwood, R.R. and Diets P.E., *The sexually sadistic killer*, 41 J. of For. Sci., 970 (1996)

[6] Davis, Joseph A., *Criminal Personality Profiling and Crime Scene Assessment*, 15 J. Contem. Crim. J., 291, 292 (August 1999).

[7] Douglas, J. E., *Criminal profiling: A viable investigative tool against violent crime*, 55 FBI L. Enf. Bull. 9.(1986)

[8] Davis, *supra* n.6 at 292.

[9] Egger, *supra* n. 1 at 245.

[10] *Id.*, at 297.

[11] Egger, *supra* n. 1 at 9.

[12] Douglas, J. E., Burgess, A.W., Burgess, A.C., and Ressler, R.K., *Crime classification manual*, Lexington, MA:Lexington Books (1992)

[13] Holmes, R.M., and Holmes, S.T., *Profiling violent crimes: An investigative tool*, Thousand Oaks, CA:Sage (1996)

[14] Davis, *supra* n.6 at 294.

[15] Flynn, Michael; Schwartz, Stephen I, *Any white powder will do*, 58 no.1 Bull. of the Atomic Sci. 6 (Jan/Feb 2002).

[16] Homant, Robert, Kennedy, Daniel B., *Psychological aspects of crime scene profiling*, v25 n4 Crim. J. and Behavior 319 (Sept 1998).

[17] Id., at 320.

[18] Phau, Ian; Prendergast, Gerard; Chuen, Leung Hing, *Profiling brand-piracy-prone consumers: an exploratory study in Hong Kong's clothing industry*, 5 nl J. of Fashion Marketing Mgt. 45 (2001); Wiedmann; Buxel, Walsh, *Customer profiling in e-commerce*, 9 n2 The J. Database Marketing 170 (2002); Weber, Karin; Roehl, Wesley S., *Profiling people searching for and purchasing travel products on the World Wide Web*, v37 n3 J. of Travel Research 291 (Feb 1999); Carr, David. *Kiosks people actually use*, v 104 n28 Marketing Mag. 14 (July 19-26 1999) ; Maddox, Kate.*Web counting field crowds up with new player: NetRatings uses profiling system to track users*, 68 Advert. Age 56 (Nov. 3 1997); Ruotolo, Frank, *Will your top guns be dueling after closing*? v33 n6 Mergers & Acq. 57 (May/Jun 1999).

[19] Watson, *Profiling Teachers Competence and Confidence to teach Particular Mathematics Topics: the Case of Chance and Data*, 4 n4 J. of Math. Tea. Educ. 305 (2001).

[20] Dinwiddle, John, *Motiviational profiling of logistics Master's students in Great Britain*, 31 n3 Intl. J. of Phys. Distrib. and Logistics Mgt. 187 (2001).

[21] Forbes, Bob, *The 5th Factor, Behavior Profiling Opens New Possibilities for Web Access Control*, 11 nl Info. Sys. Sec. (2002)

[22] Schlaeman, Steve, *Meet Your Cracker Intrusion Management Using Criminal Profiling*, 8 n3 Info. Sys. Sec. (1999).

---

[23] Jensen, William; Keppel, Lowell Bohman, Leo, *Physicians drive profiling system at Family Health*, v17 n3 Health Mgt. Tec.36 (Mar 1996).

[24] Pettit, Jan, Michael D. Kelleher, *Profiling the Lethal Employee Case Studies of Violence in the Workplace*, 31 n2 Crime, L. and Soc. Change 169 (1999).

[25] Ramirez, Deborah, McDevitt, Jack, Farrell, Amy; *A Resource Guide on Racial Profiling Data Collection Systems: Promising Practices and Lessons Learned*, DOJ Monograph (Nov 2000) 10.

[26] Skolnick, Jerome & Caplovitz, Abigail, *Guns, Drugs, and Profiling: Ways to target Guns and Minimize Racial Profiling*, 43 Ariz. L. Rev. 413 (2001)

[27]Harris, David A, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 Minn. L. Rev 264 (1999).

[28] Heumann, Milton & Cassak, Lance, *Profiles in Justice? Police Discretion, Symbolic Assailants and Stereotyping*, 53 Rutgers L. Rev 911 (2001).

[29] 517 U. S. 806 (1996)

[30] *Id.*, at 813.

[31] See e.g., *Chavez v. Illinois State Police*, 27 F. Supp. 2d 1053 (1998)

[32] 979 P. 2d 833 (SC 1999).

[33] *Id.*, at 838.

[34] *Id.*, at 838.

[35] *Minnesota v. Varnado*, 528 N. W. 2d 886 (1998); *Arizona v. Gonzalez-Gutierrez*, 927 P. 2d 776 (1996)

[36] *Arkansas v. Sullivan*, 16 S.W. 3d 551 (2000)

[37] 734 A. 2d 350 (1996).

[38] *Id* at 352.

[39] *Id* at 357.

[40] National School Safety Center,< http://www.nssc1.org./reporter/ checklist.htm>(accessed February 7,2002).

[41] Dwyer, K.,Osher,D., Warger,C. (1998) . *Early Warning, Timely Response: A Guide to Safe Schools.* WashingtonD.C.:U.S.Dept.ofEd., <http://www.ed.gov/offices/OSERS/OSEP/early_warning.html>(accessed February 8, 2002.)

[42] Id. at pp 7-8.

[43] McGee, J., DeBernardo, C., *The Classroom Avenger: A Behavioral Profile of School Based Shootings*,Forensic Examiner, May/June 1999.

[44] < http://helping apa.org/warningsigns/about.htm>l(accessed June 18, 2002).

American Association of School Administrators, http://www.aasa.org/publications/sa/2000_02/fey.htm> (accessed June 18, 2002).

[45] Id.

[46]Center for the Study and Prevention of Violence, http://www.colorado.edu/cspv/positions/position5.html> (accessed February 8, 2002).

[47] http://www.nassp.org/publicaffairs/stu_profiling.html.

[48] See, for example: R. Craig Wood and Mark D. Chestnutt, *Violence in U.S. Schools: The Problems and Some Responses,* 97 Ed. L. Rep. 619 (April 20, 1995); Eric W. Schulze and T.J. Martinez, *Into the Snakepit: Section 1983 Liability Under the State-Created Danger Theory for Acts of Private Violence at School*, 104 Ed. L. Rep. 539 (Dec. 28, 1995); Todd A. DeMitchell, *Security With the Schoolhouse Gate: An Emerging Fundamental Value in Educational Policy Making,* 120 Ed. L. Rep. 379 (Oct.16, 1997); Cary Silverman, *School Violence: Is it Time to Hold School Districts Responsible for Inadequate Safety Measure?,* 145 Ed. L. Rep. 535 (Aug. 31, 2000); Douglas Stewart and Charles Russo, *Maintaining Safe Schools,* 151 Ed. L. Rep. 363 (April 26, 2001).

[49] James A. Rapp, *Education Law* Sec.12.06 [7][b][ii](Mathew Bender, 1998)

[50] Id. at Sec. 9.02

[51] Nadine Strossen, Keeping The Constitution Inside the Schoolhouse Gate-Students' Rights Thirty Years After *Tinker v. Des Moines Independent Community School District*, 48 Drake L. Rev. 445 (2000).

[52] http://www.hamfish.org/resources/record/20/

[53] 328 F. Supp. 1077 (1971).

[54] 374 F. Supp. 1098 (E.D. N.Y. 1972), *aff'd*, 474 F.2d 699 (2d Cir. N.Y. 1973), *cert denied*, 414 U.S. 820 (1973).

[55] 464 F.2d 667(2d Cir. N.Y. 1972).

---

[56] *Id.* at pp. 8-9.

[57] http:// www.secretservice.gov/ntac/ssi_final_report.pdf.

[58] http:// www. secretservice.gov/ntac/ssi_guide.pdf.

[59] *Id.*, at 19.

[60] *Id.* at 19-21.

[61] *San Antonio Independent School District v. Rodriquez*, 411 U.S. 1, 35 (1973).

[62] 347 U.S. 483, 493 (1954).

[63] *Goss v. Lopez* 419 U.S. 565, 574 (1974).

[64] *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943).

[65] *Tinker v. Des Moines Independent School District*, 393

[66] *Kinzer v. Independent School District*, 129 Iowa 441, 105 N.W. 686 (1906).

[67] *New Jersey v. T.L.O.* , 469 U.S. 325, (1985).

[68] *Bethel School District v. Fraser*, 478 U.S. 675 (1986); *Weimerslage v. Maine Township High School District*, 29 F. 3d 1149(7th Cir. 1994); *Fuller ex. rel Fuller v. Decatur Public School District*, 251 F. 3d 662, 666(7th Cir. 2000)

[69] *Grayned v. City of Rockford*, 408 U.S, 104 (1972).

[70] *Kolender v. Lawson* 461 U.S. 352, 357 (1983).

[71] *U.S. v. Lopez* 328 F. Supp. 1077,1100 (1971).

[72] *Id.* at 1100.

[73] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).

[74] *Id* at 509.

[75] *Id* at 509.

[76] Jennifer Joseph, ABCNEWS.com , *Who is the Trenchcoat Mafia*?

[77] 478 U.S. 675 (1986).

[78] 26 F.3d 728, 737 (7th Cir. 1994).

[79] 484 U.S. 260 (1988).

[80] 220 F.3d 465 (6th Cir. 2000).

[81] *Id.*

[82] 134 F.3d 821 (7th Cir. 1998).

[83] *Beussink v. Woodland R-4 School District*, 30 F.Supp.2d 1175 (E.D.Mo. 1998) (Despite the school district's offering of evidence that students, teacher and administrators were discussing the website and that two class periods were disrupted for a few minutes each time, the court ruled that the disruption did not rise to the level of justifying the student discipline.); *Emmett v. Kent School District No. 415*, 92 F.Supp.2d 1088 (W.D. Wash., 2000) (The court held that the school could not show that a website containing mock obituaries of students with a place to vote on who would "die next," – *i.e.* who would be the subject of the next mock obituary – and therefore overturned the disciplinary action imposed). Actual injury was found in *J.S. by and through H.S. and I.S. v. Bethlehem Area School District*, 757 A.2d 412 (Pa. Cmmnw. Ct. 2000) where a teacher asserted emotional and physical distress as a result of a disparaging web site.

[84] *Tinker*, supra n. 73, at 511.

BEST COPY AVAILABLE

THE "GOOD FAITH" REQUIREMENT IN SCHOOL DESEGREGATION CASES

by

Charles L. Patin, Jr., J.D.
and
William M. Gordon, Ed. D., J.D.

(A Summary of the Proposed Presentation)

The good faith requirement was initially discussed by the United States Supreme Court in *Brown II*. However, it was not until recently, in *Freeman v. Pitts,* that the Court was to provide a definitive statement as to the meaning of the requirement, the need for specific findings with respect to it, and announce it as a prerequisite for unitary status.

This presentation traces the development of the requirement and discusses actions school districts should take to demonstrate good faith.

THE "GOOD FAITH" REQUIREMENT IN SCHOOL DESEGREGATION CASES

I. HISTORICAL BACKGROUND: THE ORIGIN AND DEVELOPMENT OF THE "GOOD FAITH" REQUIREMENT

Brown v. Board of Education of Topeka, Kansas **(*Brown I*)**, 347 U.S. 483, 98 L. Ed. 873, 74 S. Ct. 686 (1954). *Held:*

— In the field of public education the doctrine of "'separate but equal' has no place."

> ***Summary:*** *Brown I* declared separate educational facilities and opportunities for white and black students unconstitutional as in violation of the equal protection guarantees of the Fourteenth Amendment.

Brown v. Board of Education of Topeka, Kansas **(*Brown II*)**, 349 U.S. 237, 99 L. Ed. 1083, 75 S. Ct. 753 (1955). *Held:*

— All provisions of federal, state and local laws requiring or permitting racial discrimination in the area of public education must yield to the fundamental principle in the Fourteenth Amendment that racial discrimination in public education is unconstitutional.

— School authorities are charged with primary responsibility for converting from racially segregated school systems to unitary school systems freed of racial discrimination.

— Federal district courts must consider whether the action of school authorities constitutes *good faith* implementation of the governing principles of the Fourteenth Amendment. In accessing *good faith* implementation, the federal district courts may consider problems related to administration, arising from the a) physical condition of the school plant (facilities), b) the school transportation system, c) personnel (assignments of administrators, teachers and support staff), d) revision of school districts and attendance areas into compact units to achieve a system of determining admission to public schools on a nonracial basis (student assignments), and e) revision of local laws and regulations which may be necessary in solving the foregoing problems.

— Federal jurisdiction is to be retained in school desegregation cases until such time as the federal district courts are satisfied that school districts have converted to racially nondiscriminatory systems.

> ***Summary:*** *Brown II* mandated *good faith* action to eliminate segregation in the areas of facilities, transportation, administrative, faculty and staff assignments, and student assignments. It recognized the need for continuing federal supervision of school districts until such time as the vestiges of prior discrimination are eliminated.

Green v. County School Board of New Kent County, 391 U.S. 440, 20 L. Ed. 2d 716, 88 S. Ct. 1689 (1969) — *Held:*

— The burden is upon local school authorities to come forward with a plan that promises realistically to work, and promises realistically to work *now*.

— The federal district courts must determine whether school districts are acting in *good faith* and whether proposed desegregation plans have real prospects of dismantling state imposed segregation at the earliest practicable date.

> ***Summary:*** School district must act in *good faith* to eliminate racial discrimination in public education in the areas of a) student assignments, b) administrative, faculty and staff assignments, c) transportation, d) extracurricular activities, and e) facilities. (*Green*, it should be noted, expanded the areas initially mentioned in *Brown II* by adding extracurricular activities.)

Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971). *Held:*

— The nature and extent of the violation determines the scope of the remedy in a school desegregation case.

— The exercise of a federal district court's authority in a school desegregation case is based upon the violation and its remedial powers must be tailored to address the violation. (Stated differently, once the violation is remedied, there no longer exists a basis for continued federal involvement.)

—*Swann* adds to the *Green* factors the requirement for an equitable distribution of the resources of a school district. (This primarily pertains to the distribution of equipment and materials of instruction.)

> ***Summary:*** *Swann* articulates the extent of a federal district court's authority to address violations and enter remedial orders for elimination of racial discrimination in public education. It adds resource allocation as an area of the operation of a school system in which discrimination must be eliminated.

Board of Education of Oklahoma City v. Dowell, 498 U.S. 237, 112 L. Ed. 2d 715, 111 S. Ct. 630 (1991). *Held:*

— School desegregation orders are not intended to operate in perpetuity.

— In determining whether a desegregation plan ordered by a federal district court should be dissolved and federal supervision terminated, the court must address "whether the Board has complied in *good faith* with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable."

— In determining whether the vestiges of past segregation have been eliminated to the extent practicable, "the District Court should look not only at student assignments, but 'to every facet of school operations."

> ***Summary:*** ***Dowell*** underscores the need that school districts implement desegregation plans in *good faith*. It also puts to rest the contention that a school district which once operated a dual education system is only obligated to comply either with the court's desegregation plan or the areas discussed in ***Green*** and ***Swann***. Under ***Dowell***, a school district seeking unitary status, dissolution of the injunctive decree and a termination of the court's supervision, must show both that it has complied in *good faith* with the court's desegregation plan for a reasonable period

— The exercise of a federal district court's authority in a school desegregation case is based upon the violation and its remedial powers must be tailored to address the violation. (Stated differently, once the violation is remedied, there no longer exists a basis for continued federal involvement.)

—*Swann* adds to the *Green* factors the requirement for an equitable distribution of the resources of a school district. (This primarily pertains to the distribution of equipment and materials of instruction.)

> ***Summary:*** *Swann* articulates the extent of a federal district court's authority to address violations and enter remedial orders for elimination of racial discrimination in public education. It adds resource allocation as an area of the operation of a school system in which discrimination must be eliminated.

Board of Education of Oklahoma City v. Dowell, 498 U.S. 237, 112 L. Ed. 2d 715, 111 S. Ct. 630 (1991). *Held:*

— School desegregation orders are not intended to operate in perpetuity.

— In determining whether a desegregation plan ordered by a federal district court should be dissolved and federal supervision terminated, the court must address "whether the Board has complied in *good faith* with the desegregation decree since it was entered, and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable."

— In determining whether the vestiges of past segregation have been eliminated to the extent practicable, "the District Court should look not only at student assignments, but 'to every facet of school operations."

> ***Summary:*** ***Dowell*** underscores the need that school districts implement desegregation plans in *good faith.* It also puts to rest the contention that a school district which once operated a dual education system is only obligated to comply either with the court's desegregation plan or the areas discussed in ***Green*** and ***Swann***. Under ***Dowell***, a school district seeking unitary status, dissolution of the injunctive decree and a termination of the court's supervision, must show both that it has complied in *good faith* with the court's desegregation plan for a reasonable period

of time *and* that it has eliminated discrimination to the extent practicable in all areas of its operations as cited in ***Green*** and ***Swann***.

Freeman v. Pitts, 503 U.S. 467, 118 L. Ed 2d 108, 112 S. Ct. 1430 (1992). *Held:*

— Federal judicial supervision in a desegregation case may be incrementally relinquished before full compliance has been achieved in every area of school operations.

— Incremental relinquishment of a federal district court's supervision must be exercised in a manner consistent with the purposes and objectives of its equitable power.

— In ordering partial relinquishment of judicial supervision, the court must determine: "[a] whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; [b] whether retention of judicial control in necessary or practicable to achieve compliance with the decree in other facets of the school system; and [c] whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance."

— One of the "prerequisites to relinquishment of [judicial] control *in whole or part* is that a school district has demonstrated its commitment to a course of action that gives full respect to the equal protection guarantees of the Constitution." (emphasis supplied.)

—Particular attention must be given to the school system's record of compliance. "A school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations."

— Federal district courts must make "more specific findings" as to a school district's *good faith*. This is because a history of *good faith* compliance "enables the district court to accept the school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future."

— ***Freeman*** further points out that it is appropriate for a federal district court "to inquire whether other elements [of racial discrimination] ought to be identified, and to determine whether minority students [are] being disadvantaged in ways that require the formulation of new and further remedies to insure full compliance with the court's decree." (In ***Freeman***, the district court found the "quality of education" constituted another area of the operation of the school system in which additional remedies were required. This area in ***Freeman*** dealt with the disproportionate assignment of better educated and more experienced teachers in schools with disproportionately high percentages of white students, and because per pupil expenditures in majority white schools exceeded per pupil expenditures in majority black schools.)

> ***Summary:*** ***Freeman*** recognized that partial unitary status is available to a school district which has achieved unitary status in one or more but not all of the areas cited in ***Green*** and ***Swann*** where full and satisfactory compliance is found, granting of partial unitary status in one or more areas will not impede the achievement of compliance in the remaining areas of its operations, and where the school district has acted in *good faith* such that its actions have demonstrated, to the public and to those on whose behalf the lawsuit was filed, a commitment to the *whole* of the court's orders and to those provisions of the law and the Constitution which were the predicate for judicial intervention in the first instance. ***Freeman*** further recognized that additional remedies, in areas such as the quality of education, might be ordered in furtherance of the court's prior orders.

II. SUMMARY OF REQUIREMENTS FOR UNITARY STATUS

— *Good faith* implementation of the whole of the court's decree;

— A record of compliance with the orders of the court;

— Policies forming a consistent pattern of lawful behavior; and

— Elimination of discrimination to the extent practicable in all areas of the operations of a school system, comprised of a) student assignments, b) administrative, faculty and staff assignments, c) transportation, d) extracurricular activities, d) facilities, e) resource allocation, and f) the quality of education.

III. THE *GOOD FAITH* REQUIREMENT

— Beginning with ***Brown I***, each of the major decisions of the United States Supreme Court has emphasized the need that a school district act in *good faith* to disestablish prior dual systems of education for the races and in efforts to implement desegregation decrees of the federal district courts.

— ***Freeman***, decided 37 years after ***Brown I***, represents the Supreme Court's culminating statement on the meaning of the *good faith* requirement. *Good faith* entails:

> a demonstrated commitment to a course of action that gives full respect to the equal protection guarantee of the Fourteenth Amendment;
>
> the adoption of policies forming a consistent pattern of lawful conduct directed to eliminating earlier violations;
>
> a history of compliance with the orders of the court;
>
> action sufficient to demonstrate, to the public and to the parents and students of the once disfavored race, a commitment to the whole of the court's decree and to those provisions of the law and the Constitution that were the predicate for judicial intervention in the first instance.

IV. SCHOOL DISTRICT ACTIONS DEMONSTRATING *GOOD FAITH*

— Voluntary action to increase levels of desegregation in schools: In ***Freeman*** it is noted that over a period of about two decades the school district made 170 changes to student attendance zones;

— Implementation of majority-to-minority student transfers;

— Institution of magnet programs designed to attract a desegregated student body. [This entails a) the offering of quality educational programs, b) which are not duplicated in regular and comprehensive school, c) with necessary materials of instruction and equipment, d) which are staffed with competent school-site administrators and qualified faculties (certified and experienced teachers who have undergone necessary training];

— Offering of racially integrated "experience programs;"

— Infrequent and limited judicial intervention into the affairs of a school district.

— An extensive period of compliance with the court's decree;

— A history of having never been found in violation of court order;

— A history of having never been sanctioned;

— A history of extensive consultation with the black community and plaintiff representatives;

— Adoption of a multi-cultural curriculum for students in all grades;

— Special in-servicing for teachers to better enable them to deal with diverse student populations;

— Adoption of policies forming a consistent pattern of lawful conduct;

— A record of having never failed to comply with an order of the court;

— Taking of actions to further desegregation above and beyond what was required in the court's order;

— Actions to maintain levels of desegregation in schools within the school system.

> ***Summary:*** A finding of *good faith* requires *voluntary compliance* with the orders of the court and the taking of *voluntary actions* to further levels of desegregation. *Voluntary action,* taken without judicial compulsion, serves to enable a court to accept a school district's representation that it has

accepted the principle of racial equality and will not suffer intentional discrimination in the future if judicial supervision is relinquished. It also serves to demonstrate, to the public and to those on whose behalf the lawsuit was filed, a commitment to those provisions of the law the Constitution that were the predicate for judicial intervention in the first instance.

V. STEPS TO BE TAKEN TOWARD SEEKING UNITARY STATUS

— A history of *good faith* implementation of the court's orders;

— Retention of competent professionals: an attorney with desegregation litigation experience and a desegregation consultant;

— Compilation of prior court orders and school district reports;

— Compilation of data showing compliance with prior court orders and elimination of vestiges of past discrimination;

— Conduct a compliance audit (this will normally be done by the desegregation consultant or attorney);

— Discussions with the parties, interested citizens, and the press and media to provide information and assess the climate within the school district as it relates to desegregation activities and may assist, where necessary, with the design of additional remedial measures in any areas in which full and satisfactory compliance, as yet, may not have been achieved;

— Review of school board policies and the making of necessary revisions.

ATTACHMENT I

"SCHOOL DESEGREGATION CASES: THE 'GOOD FAITH' REQUIREMENT

BY

CHARLES L. PATIN, JR., J.D.
AND
WILLIAM M. GORDON, Ed. D., J.D.

(A Manuscript of an Article Appearing in
159 Ed. Law Rept. 407 (January 31, 2002))

SCHOOL DESEGREGATION CASES: THE "GOOD FAITH" REQUIREMENT

By Charles L. Patin, Jr.
and
Dr. William M. Gordon[1]

Stephen Furr, a member of the Rapides Parish School Board, aptly commented following a discussion about the "good faith" requirement in school desegregation cases that:

> *The "good faith" requirement may be the single most difficult of all the requirements of a unitary system. It demands a change in attitude which must be evidenced in the words and actions of the members of the Board and all those connected with the school system.* (emphasis supplied.)

In the wake of the United States Supreme Court's 1992 decision in *Freeman v. Pitts,*[2] the underlying test as to whether a school district has operated in "good faith" and is entitled to the entry of a judgment terminating judicial supervision in a school desegregation case is

> *whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance."*[3] (emphasis supplied.)

Freeman's test, its origin and development, and a discussion of the kinds of actions school districts should undertake in its aftermath form the subject matter of this article.

THE ORIGIN AND DEVELOPMENT OF THE GOOD FAITH REQUIREMENT IN *FREEMAN V. PITTS*

The origin of the "good faith" requirement can be traced to the United States Supreme Court's decision in *Brown II.*[4] There the Court commanded "good faith compliance at the earliest practicable date[,]"[5] with its landmark decision in *Brown I.*[6] *Brown I* declared state imposed segregation in the field of public elementary and secondary education unconstitutional as in violation of the guarantees in the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. *Brown II,* decided during the following term of the Court, placed primary responsibility upon local school districts to undertake necessary action to convert to unitary systems "with all deliberate speed"[7] and charged federal district courts with the responsibility of assessing "whether the action of local school authorities constitutes good faith implementation of the governing constitutional principles[]" elucidated in *Brown I.*[8] It also directed governments at all levels to undertake affirmative steps to dismantle laws requiring or permitting segregation in the area of public education. The Court observed that "[a]ll provisions of federal, state and local law requiring or permitting such discrimination must yield to [the principle that racial discrimination in public education is unconstitutional]."[9]

Implicit in *Brown II* was an expectation that local school districts would come forward with plans to establish unitary systems and that states would adopt legislation to repeal statutes requiring separate educational opportunities and facilities for the races. From its inception, therefore, "good faith" envisioned that *voluntary* action would be taken by local school district and state officials to comply with the rule of law in *Brown I* and the mandate in *Brown II.*

In most, if not all, instances the initial response of school districts "to the mandate in *Brown II* was an all too familiar one. Interpreting 'all deliberate speed' as giving latitude to delay steps to desegregate,"[10] school districts undertook virtually no action to convert to unitary systems in the decade following *Brown II.*

But the time for "all deliberate speed" was drawing to an end. In *Green v. County School Board of New Kent County,*[11] decided just over a decade after *Brown II,* the Court stated "the time for mere 'deliberate speed' has run out[.]"[12] "The burden on a school board today is to come forward with a plan that promises realistically to work, and promises to realistically work *now.*[13] (emphasis by the Court.) The *Green* Court observed

> It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in *good faith* and the proposed plan to have real prospects for dismantling the state-imposed dual system "at the earliest practicable date," then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith[.][14] (emphasis supplied.)

Green went on to identify areas or facets of the operations of school districts in which prior state sanctioned discrimination must be eliminated. These areas or facets in which *vestiges* of prior dual education systems for the races lingered were said to be comprised of student assignments, administrative, faculty and staff assignments, extra-curricular activities, transportation, and facilities. Discrimination in these areas was to be eliminated "root and branch."[15] Subsequent cases expanded these areas so as to include resource allocations, as addressed in *Swann v. Charlotte-Mecklenburg Board of Education*[16] and the right to a "quality education,"[17] as discussed in *Freeman.* These areas may be said in a practical way to constitute what we understand today as the "*Green* Factors." "The *Green* factors are a measure of the racial identifiability of schools in a system that is not in compliance with *Brown*[.]"[18]

The expanding role of federal district courts, foreshadowed in *Green*, was to come to fruition in *Swann*. The *Swann* Court announced where "school authorities fail in their affirmative obligations under [*Brown II* and *Green*], judicial authority may be invoked."[19] This language formally ushered in the era of federally imposed school desegregation orders. The power of federal district courts to fashion school desegregation orders through their equity jurisdiction came with the concomitant obligation that school districts implement them in *good faith*. The good faith requirement of *Brown II* was thus expanded. "Good faith" could be demonstrated not only through self-initiated voluntary action but also through the implementation of the orders of courts sufficient to demonstrate a *good faith* commitment to the principles of equality in the Fourteenth Amendment.

The next major developmental step was to come decades later in *Board of Education of Oklahoma City v.Dowell.*[20] There the Court observed that the issue of whether a school district should be declared unitary, and judicial supervision terminated, must turn on whether a school district has implemented "in good faith . . . the desegregation decree since it was entered, *and whether the vestiges of past discrimination [have] been eliminated to the extent practicable.*"[21] (emphasis supplied.) The requirement that *all* vestiges of past discrimination be eliminated to the extent practicable formally recognized what to that point in time had been more or less implicit in the cases — that is say a school district's good faith must be assessed in light of its policies and action as they relate to compliance with the remedial measures in orders of the court, *any* remaining *Green* Factors which were not addressed in those orders, and any other facets of the operation of a school district in which other *vestiges* of discrimination might still exist.[22]

Dowell clarified whatever ambiguity earlier cases might have interjected into the analysis federal district courts were to employ in approaching a school district's motion for unitary status. Mere compliance with the verbage of a federal school desegregation order limiting remedial actions to less than all of the *Green* Factors would not suffice. The requisite showing of good faith also must involve a judicial finding that a school district has eliminated past discrimination in *all facets of its operations to the extent practicable.*

Dowell, therefore, demonstrated a continuing commitment by the Court to the principles it had earlier announced in *Brown I*, and the mandate and requirements in *Brown II*, *Green* and *Swann*. Even though language in many of the older federal school desegregation orders was limited to specific remedial measures, usually in the areas of student and faculty and staff assignments, *Dowell* reiterated a unitary school system is one in which *all vestiges of prior discrimination have been eliminated to the extent practicable.*

On the heels of *Dowell* came *Freeman*. It underscored what had been said a year earlier in *Dowell*: "a school district that was once dual must be examined in all of its facets, . . . when the question is whether the district court's remedial control ought to be modified, lessened, or withdrawn."[23]

But *Freeman's* pronouncements on good faith went much further than prior case law and were to firmly entrench good faith as an essential requirement of a unitary system. *Freeman* recognized good faith compliance as "*one of the prerequisites to relinquishment of* [judicial] *control*[.]"[24] A good faith commitment to the entirety of a school district's desegregation plan was viewed as necessary "in order to insure that the principal wrong of the *de jure* system, the injuries and stigma inflicted upon the race disfavored by the violation, [would be] no longer present."[25] This finding in turn requires a showing by a school district sufficient to "demonstrate[], to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance."[26] Only a *voluntary* change of attitude, evidenced in the words and actions of the members of a school board and all those connected with a school system, is sufficient to make this showing.

It is not surprising, therefore, that the Court in *Freeman* observed that "[a] history of good-faith compliance" is necessary in order that a federal district court may "accept [a] school board's representation that it has accepted the principle of racial equality and will not suffer intentional discrimination in the future."[27] Moreover,

> [c]ourts have recognized that the mere adoption of a racially neutral remedial plan is not tantamount to desegregation. Thus, where a court has reason to believe that *a discriminatory animus still taints local decisionmaking*, it may be appropriate for the court to retain jurisdiction for some period after neutral procedures have been implemented.[28] (citations omitted; emphasis supplied.)

Accordingly, a good faith showing cannot be based upon a temporary ritualistic change in behavior on the eve of filing a motion for unitary status. A pattern of dedication to the whole of the court's orders and to the constitutional principles embodied in the Fourteenth Amendment must be shown for a "reasonable period of time."[29] The case law appears to suggest that a "reasonable period of time" consists of at least three years from the commencement of the implementation of a desegregation plan.[30]

Freeman, therefore, may be viewed as a culminating step in the Court's development of the "good faith" requirement; a development which has spanned nearly four decades. Its essential aspects, traceable to *Brown II's* call for *voluntary* action and judicial oversight, remain firmly intact. What *Freeman* adds is a requirement that a specific judicial finding be made that a school district has taken sufficient and consistent action for a reasonable period of time to convey and demonstrate a) a change of attitude to those on whose behalf the lawsuit was brought, and b) an acceptance of Fourteenth Amendment principles sufficient to suggest to the court that if judicial supervision is relinquished the school district will not likely return to its former discriminatory ways.

It must be remembered that the jurisdiction of federal courts in school desegregation cases is derived through their equity jurisdiction. "Clean hands," a cornerstone tenet of equity, must be shown by a school district seeking relief from a school desegregation order. A school district's clean hands can only be shown through compliance with the orders of the court and an acceptance of the principles embodied within the Fourteenth Amendment sufficient to demonstrate "to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance." Only with a change in attitude evidencing a commitment to the principle of equality of educational opportunities for *all* children is such a demonstration possible.

ACTION WHICH DEMONSTRATES GOOD FAITH

"A school system is better positioned to demonstrate its good-faith commitment to a constitutional course of action when its policies form a consistent pattern of lawful conduct directed to eliminating earlier violations[.]"[31] Accordingly, school boards should have all existing policies in the areas of student assignments, administrative, faculty[32] and staff assignments, extra-curricular activities, transportation, facilities, and resource allocations reviewed to determine whether they comport with the requirements of *Green, Swann, Singleton*[33] and *Freeman*. Where policies do not exist, they should be *voluntarily* adopted and submitted to the parties for review and comment and to the court for approval.

In addition to policies designed to address *Green* Factors *per se*, there will likely be a need to consider adoption of policies addressing student discipline, teacher recruitment, harassment of students because of race or color, measures to increase minority participation in gifted and talented programs and other advanced courses, parental and community involvement practices and procedures, and perhaps other areas as well. The need for these more particularized policies will depend upon the facts in a given case.

Other action may be necessary as well. In this regard, *Freeman* and its progeny offer helpful examples. *Freeman* involved a motion for unitary status by the DeKalb County School District (hereinafter referred to as the "DCSD") which had operated under federal supervision since 1969. Partial unitary status was granted in the area of student assignments, and three other areas as well.[34] Because of the obvious significance of student assignments, the Court's reasoning in this area will be examined more closely. It offers excellent examples of actions school districts can take to demonstrate good faith.

At the time of the filing of the motion for unitary status, approximately 73,000 students were enrolled in the DCSD in grades kindergarten through twelve. Over the ensuing years preceding the filing of the unitary status motion in 1986, the DCSD had experienced significant changes in the racial composition of its student population. The school district's overall resident population had grown from about 70,000 residents to approximately 450,000 persons in about a thirty year span. The racial composition of the student population had grown from a little under six percent black in 1969 to 47 percent black in 1986. Remarkable demographic changes occurred as well. The northern portion of the school district had become predominately white, while the southern portion had become predominately black.

Mindful of the "continuing" nature of the duty to desegregate,[35] the DCSD had made "about 170" boundary line changes to its student attendance zones since the filing of the school desegregation lawsuit.[36] Only three of the 170 student attendance zone changes were found to have had even a partial segregative effect.[37]

The school district had initiated a majority-to-minority ("M-to-M) student transfer policy in 1972 to promote voluntary student transfers to increase levels of desegregation and minimize racial isolation. M-to-M transfers permit a student whose race is in the majority in his/her student attendance zone school to transfer to a school in another student attendance zone in which his/her race will be in the minority. In general, M-to-M transfers permit black students attending predominately black schools to transfer to predominately white schools until the racial composition of the receiving school reaches 50 percent white and 50 percent black or some other percentage depending upon school board policy or an order of the court. M-to-M transfers also are available to white students enrolled in predominately white schools who desire to transfer to a predominately black school.

Magnet programs were instituted in the early 1980's. A performing arts, two science, and foreign language magnet programs were offered.[38] These programs were located in schools in the middle of the school district to better draw both white and black students residing in the northern and southern portions of the school district.

In addition, racially integrated "experience programs" were offered in areas such a writing for fifth and seventh graders, a driving range, summer school programs, and a dialectical speech program. Measures were employed by the DCSD to control the racial mix in each of these programs to insure that they would be operated on a desegregated basis.[39]

Finally, it is significant to note that the Court observed that "only infrequent and limited judicial intervention into the affairs of [the DCSD][]" had been required during the period of judicial supervision.[40] This served as further evidence of a pattern of substantial compliance over the years with the court's orders.[41]

These combined actions, and the lack of a need for constant judicial intervention, were deemed sufficient by the Court to show that the DCSD had "achieved the maximum practical desegregation from 1969 to 1986."[42]

Lower federal court decisions in the wake of *Freeman* provide additional examples. A few of them are discussed here. *Manning v. School Board of Hillsborough County, Florida,*[43] involved an appeal by a school district to a district court judgment denying a motion for unitary status. The school district had operated under a court imposed school desegregation order from the early 1970's until 1991 when a consent decree had been entered into by the parties and approved by the court. The consent decree modified the court's earlier order. It was to be implemented over a seven year period. One of the major aspects of the consent decree was the elimination of sixth grade center schools. These were replaced by middle schools under the terms of the decree.

In 1994, the plaintiffs filed a motion to enforce the consent decree. The motion was referred by the court to a magistrate who recommended denying the motion. In response to the recommendation, the court deferred ruling on the motion and remanded the matter to the magistrate to consider of whether the school district had achieved unitary status and was entitled to termination of judicial supervision. The motion was tried before the magistrate in 1996. In 1997, the magistrate recommended to the court that it find the school district unitary and terminate judicial supervision.

Testimony was offered and considered by the magistrate on the issue of good faith in accordance with *Freeman*. Based upon the testimony, the magistrate judge concluded the school district had complied in good faith with the court's decree. Testimony was offered by the superintendent, the school board's chairman and several of its members. The testimony of the school district witnesses was found to show a commitment to Fourteenth Amendment principles. The superintendent testified "he felt 'a moral and legal obligation on the school system to continue a desegregated school system.'"[44] The chairman of the school board testified the school board was "going to guarantee that students will receive [an] equal education."[45] School board members "expressed no misgivings about . . . the intent and ability of the School Board to continue a desegregated school system while receiving input from all members of the community."[46]

In addition, a twenty-five year history of compliance with the court's orders was observed by the magistrate. Not once had the school district been found in violation of any court order. Furthermore, the magistrate found the school district had regularly conferred with the plaintiffs "to ensure that the school system was moving forwards, not backwards, toward compliance with the [c]ourt's orders."[47]

Based upon this evidence, the magistrate concluded the action of the school district "demonstrates that [the school board has] accepted the principle of racial equality and will not revert back to a dual school system."[48]

However, the district court rejected the magistrate's recommendation. On appeal, the court of appeals' discussion of the good faith requirement focused on factors such as a) the school district's history of *never* violating a court order; b) the school district had never been sanctioned; and c) the school district had consulted extensively with the black community, including the plaintiffs, prior to implementing new student assignments under the 1991 consent decree.[49] In addition, the court noted magnet programs had been adopted specifically to reduce racial isolation and to promote desegregation, that a multi-cultural curriculum for students in all grades had been proposed and that special in-servicing for teachers was provided to enable them to deal with diverse student populations.[50] The court went on to note "a court should not dwell on isolated discrepancies, but rather should 'consider whether the school board's policies form a consistent pattern of lawful conduct directed to eliminating earlier violations.'"[51] The district court's ruling was reversed and the case was remanded for further proceedings before the district court judge.

The school district's history of compliance, the use of magnet programming, and its regular discussions with the "African-American" community were sufficient to demonstrate to those on whose behalf the case had been filed that the school district had made a commitment "to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance."

In *Lockett v. Board of Education of Muscogee County School District,*[52] the court of appeals observed that

> A good faith commitment to a desegregation plan also demonstrates to parents, students, and the public that students will no longer suffer injury or stigma. At the same time, it "enables the district court to accept the school board's representation that [the school board] has accepted the principal of racial equality and will not suffer intentional discrimination in the future." To determine if a school board has shown a good faith commitment to a desegregation plan, a district court should, among other things, consider whether the school board's policies "form a consistent pattern of lawful conducted directed to eliminating earlier violations." (citations omitted.)

The court went on to observed that the school board had a history of a) having never been enjoined or sanctioned; b) having never failed to comply with a court order; c) taking actions to further desegregation above and beyond what was required in the court's plan; d) taking unsurpassed actions to maintain the highest levels of desegregation within its schools of any school system in the nation; e) successfully implementing magnet programs which had desegregated schools; f) consulting with both white and black citizens prior to adoption of a neighborhood student assignment plan; and g) implementing a majority-to-minority student transfer plan to offset any negative racial impact of the neighborhood student assignment plan.[53] This conduct was found sufficient to support a finding of good faith.

Reed v. Rhodes[54] involved a motion to modify a consent decree and terminate judicial supervision over student assignments in the Cleveland Public School System. After citing *Freeman* and noting the necessity that a school district must have

> demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's [seminal remedial order] and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance[,][55]

the court observed the school district had not only complied with the student assignment plan to the extent practicable but, also, that it had implemented

> far more demanding compliance requirements . . .to override the demographics of the City of Cleveland. In addition to extensive student attendance, zone boundary changes and clustering, provision for minority-to-minority transfers, magnet schools, and community schools, the District also implemented one of the nation's most extensive and arduous programs of mandatory student reassignments and transportation. The District reassigned students annually during this period to ensure that schools that had fallen out of compliance due to population mobility within [the] District were returned to compliance within the ± 15% requirement.
>
> A comparison of the Cleveland School District's compliance with the student assignment component of the Remedial Order as incorporated into the Consent Decree with the history of compliance approved by the Supreme Court in *Freeman* compels the conclusion that the Cleveland District achieved "full and satisfactory" compliance with court-imposed requirements during the relevant periods.[56]

CONCLUSION

What has remained consistent throughout the development of the good faith requirement is the need for *voluntary* action. A history of compliance with the orders of the court, punctuated by minimal judicial intervention into the affairs of a school district; the adoption and implementation of school board policies demonstrating a consistent pattern of lawful conduct; the use of M-to-M transfers and magnet programming to reduce racial isolation; regular communications between the parties and members of the African American community, all require *voluntary* action and serve to evidence good faith by demonstrating

> *to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance.*

In short, the long journey to unitary status cannot be completed where a school district's compliance is constantly coerced by judicial edict or the intercession of others acting on behalf of the court to fashion policies compliant with the law. A history of foot-dragging and contentiousness, with the concomittant need for frequent judicial intervention, cannot demonstrate acceptance of the principle of equality embedded in the Fourteenth Amendment or demonstrate to the court that once judicial supervision is terminated that it will be unlikely that a school district would return to its former ways.

FOOTNOTES

1. Charles L. Patin, Jr. is a partner with the Baton Rouge law firm of Kean, Miller, Hawthorne, D'Armond, McCowan and Jarman, L.L.P. Mr. Patin successfully negotiated the consent judgment in "Valley, et al. v. Rapides Parish School Board," and serves as lead desegregation attorney for the Rapides Parish School Board.

Prior to joining the Kean, Miller law firm in 1989, Mr. Patin served as Chief of the Civil Division of the Louisiana Department of Justice for several years, followed by a short tenure as chief litigation attorney on the legal staff of former Governor Buddy Roemer.

Dr. William M. Gordon is a well recognized school desegregation expert and consultant with over 30 years of experience. He has provided expert and consulting services for a number of school districts and state departments of education, as well as plaintiff groups and the United States Department of Justice in numerous cases. He has been appointed to serve as an expert by several courts and has been appointed by other courts to serve as a desegregation plan compliance monitor. Dr. Gordon has designed several school desegregation plans during his career. He presently serves as a desegregation consultant and expert for the Rapides Parish School Board and has been, or is currently, involved in several other school districts in Louisiana.

Dr. Gordon also has substantial experience in the field of education. He formerly taught and served as a principal at the elementary and middle levels, and, at the university level, as a Professor of Educational Leadership at Wright State University in Dayton, Ohio. He has frequently appeared as a guest lecturer at universities around the world.

In addition, he has published numerous articles and co-authored several books in the area of school desegregation.

2. 503 U.S. 467, 118 L. Ed. 2d 108, 112 S. Ct. 1430 (1992).

3. *Id.* at 491.

4. *Brown v. Board of Education of Topeka,* (*Brown II*) 349 U.S. 294, 99 L. Ed. 1083, 75 S. Ct. 753 (1955).

5. *Id.* at 300.

6. *Brown v. Board of Education of Topeka,* (*Brown I*) 347 U.S. 483, 98 L. E. 873, 74 S. Ct. 686 (1954).

7. 349 U.S. at 299 and 301.

8. *Id.* at 299.

9. *Id.* at 298.

10. *Freeman,* 503 U.S. at 472.

11. 391 U.S. 430, 20 L. Ed. 2d 716, 88 S. Ct. 1689 (1968).

12. *Id.* at 438, citing *Griffin v. County School Board,* 377 U.S. 218, 234, 12 L. Ed. 2d 256, 84 S. Ct. 1226 (1964).

13. *Green,* 391 U.S. at 439.

14. *Id.*

15. *Id.* at 438.

16. *Swann v. Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 18, 28 L. Ed. 2d 554, 91 S. Ct. 1267 (1971).

17. *Freeman,* 503 U.S. at 482.

18. *Id.* 503 U.S. at 486.

19. *Swann,* 402 U.S. 1, 15.

20. 498 U.S. 237, 112 L. Ed. 2d 715, 111 S. Ct. 630 (1991).

21. 498 U.S. at 249-50. See *Coalition to Save Our Children v. State Board of Education of State of Delaware,* 90 F.3d 752, 760 (3rd Cir. 1996) (observing "the phrase 'to the extent practicable' implies a reasonable limit on the duration of . . . federal supervision").

22. See *Manning v. School Board of Hillsborough County, Florida,* ___ F.3d ___, 2001 WL 264977, at p. 11 (11th Cir. (Fla.)) (citing *Freeman* and observing "For a district court to determine whether the vestiges of discrimination have been eliminated to the extent practicable, it must examine the six *Green* factors . . . . *Using its discretion, a court may also consider other facets*[] (emphasis supplied")). In *Freeman* the use of this discretion was utilized to cite discrimination in the assignment of experienced and advanced degree teachers as a lingering vestige of the former dual system.

23. 503 U.S. at 486.

24. *Id.* at 490.

25. *Id.* at 485.

26. *Id.* at 491.

27. *Id.* at 498.

28. *Morgan v. Nucci,* 831 F.2d 313, 321 (1st Cir. 1987), cited with favor in *Freeman,* 503 U.S. at 498-99.

29. *Dowell,* 498 U.S. at 248-49 (observing a desegregation decree may be dissolved after compliance for a "reasonable period of time;" the Court further observed that the "passage of time enables the district court to observe the good faith of the school board in complying with the decree").

30. See *Lee v. Etowah County Board of Education,* 963 F.2d 1416, 1422 (11th Cir. 1992) (observing "the district court must retain jurisdiction for a period of time after the school system has implemented a desegregation plan, to guard against the possibility of recurring constitutional violations, and to ensure the achievement of the ultimate goal — a unitary public school system in which the state does not discriminate between children on the basis of race. After a period of time sufficient to achieve these objectives has elapsed — *this court has required a period of not less than three years* — a district court may terminate a desegregation case by holding a hearing to determine if the school system has achieved unitary status" [emphasis supplied]); see also *United States v. Texas Education Agency,* 647 F.2d 504, 508-09 (5th Cir. 1981) *cert. denied,* 454 U.S. 1143, 71 L. Ed. 2d 295, 102 S. Ct. 1002 (1982) (observing district courts must retain jurisdiction in school desegregation cases "for a period of not less than three years" to insure proper implementation of a desegregation plan).

31. *Freeman,* 503 U.S. at 491.

32. In the area of faculty assignments, care should be taken to assure the non-discriminatory and proportional assignments of certified, advanced degreed and specialist certificated, and experienced teachers throughout a school system.

33. *Singleton v. Jackson Municipal Separate School District,* 419 F.2d 1211 (5th Cir. 1969).

34. 503 U.S. at 471.

35. See *Green,* 391 U.S. at 439.

36. *Freeman,* 503 U.S. at 479.

37. *Id.*

38. *Id.*

39. *Id.* at 479-80. .

40. *Id.* at 473.

41. Frequent contentious litigation, whether initiated by plaintiffs contending a school district is not fulfilling its obligations under the court's orders or whether initiated by a school district seeking to avoid, or narrow the scope of, its obligations, is not conducive to a finding of a history of good faith compliance.

42. *Id.* at 480.

43. ___ F.3d ___, 2001 WL 264977 (11th Cir. (Fla.)).

44. *Id.* at 9.

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. An example of how such communication may be facilitated in the context of a consent judgment is language found in the recent Consent Judgment approved by the court in *Valley, et al. v. Rapides Parish School Board,* Civil Action No. 10946, USDC W. D. La. It requires formation of a "working group" composed of school district personnel and citizens of the parish selected by counsel for plaintiffs and plaintiff-intervenor.

50. *Manning,* 2001 WL 264977 at 6.

51. *Id.* at 14.

52. 111 F.3d 839, 843 (11th Cir. 1997).

53. 111 F.3d at 843-44.

54. 934 F. Supp. 1533 (N.D. Ohio 1996), *affirmed,* 179 F.3d 453 (6th Cir. 1999).

55. *Id.* at 1548.

56. *Id.* at 1550-51.

Desegregation, Unitary Status and Vouchers

James J. Van Patten, University of Arkansas

Barbara Shircliffe, University of South Florida

Education Law Association
48th Annual Conference
November 14-16, 2003
New Orleans, Louisiana
2:30-3:40 P.M. C.2 Desegregation

Desegregation, Unitary Status, and School Choice

Overview. One can argue more recent court decisions in school desegregation cases mark a shift in the federal courts' perspective on local district accountability toward maintaining racially balanced schools. As courts declare more and more school districts unitary, and therefore, released from court oversight, old questions are being raised again about school board accountability for racially segregated schools and the constitutionality of school choice programs, particularly those involving religious schools. However, today, courts are more willing to attribute patterns of racial segregation to demographic changes in residential housing markets rather than to past vestiges of the segregated system as they had done in the past. Indeed, in a few cases, school boards have put forward school choice plans, once viewed constitutionally suspect, as a means to gain release from court oversight. Several schools districts, declared unitary by the courts, have proposed control choice plans, involving magnets schools, as a way of maintaining desegregation in the post-desegregation era. In these districts, parental outrage about the expense and inconvenience of busing has subsided as "voluntary" busing for choice has replaced "mandatory" busing for desegregation. Nevertheless, school officials and community leaders still must grapple with increasing patterns of racial segregation in schools, and gross disparities in both educational experience and outcomes. Moreover, in this seemingly new era of school choice, who is accountable for segregated schools in the post desegregation era, remains a significant and unresolved question.

Background: Courts, Desegregation, and Choice

Thirty years ago, the Supreme Court and federal district judges questioned the legitimacy of using parental choice, then referred to as "freedom of choice plans," as a mechanism for developing non-segregated schools, providing relief to African American school children long denied their constitutional rights. In the decades following the *Brown* decision, school districts established "freedom of choice plans," where parents could chose to send their child to a school nearest their residence, or second nearest, as a good faith effort toward establishing a non-racial basis for student assignment. In most southern states, pupil assignment laws, quickly passed by state legislatures in response to the *Brown* decision, allowed school boards to approve or deny school transfer requests. With that power, school boards could then deny African American parents' requests to send their children to all white schools "legally," citing grounds other than race. In Florida, school officials could base pupil assignment on such factors as the child's social economic status, cultural background, and psychological disposition. Prior to the 1960s, a few federal judges took issue with these pupil assignment laws, stating they could not be used as evidence of good faith compliance (*Gibson el al. v. Dade County,* 1959). However, it was not until after the passage of the 1964 Civil Rights Act that federal courts began to demand school board accountability for creating and maintaining a desegregated system.

During the mid to late 1960s, the Fifth Circuit Court of Appeals ruled that school boards had an affirmative duty to create an integrated school system (*Singleton v. Jackson,* 1966; *United States v. Jefferson County,* 1966). In 1968, the U.S. Supreme Court affirmed the school board's obligation and called into question "freedom of choice" plans that did not result in desegregation (*Green v. New Kent County*, 1968). Following *Singleton* and *Green*, federal judges dismissed school officials' claims that geographical barriers, natural or man-made, and residential segregation prevented complete desegregation. In 1970, the then Fifth Circuit Court of Appeals, by far the most activist court, opined "Barriers (geographical, roadway etc.) which did not prevent enforced segregation will not be held to prevent conversion to a full unitary system" (*Henry v. Clarksdale Municipal Separate School District* 5th Cir., 1970). Finally with its decision in *Swann v. Charlotte-Mecklenburg* (1971), the Supreme Court affirmed the power of the federal courts to order desegregation plans that utilized transportation to achieve racial balance in the schools. Later the Supreme Court stated that school boards were not required to transport students across district lines, limiting the use of what became to be referred to as "busing" in many northern and mid-western school districts with high minority school populations. For most of the South, however, where countywide districts encompassed urban, suburban, and rural areas, metropolitan desegregation plans involving busing resulted in some of the most desegregated school systems in the nation. As was suggested elsewhere, it is plausible that countywide district organization and court oversight has meant that many southern school systems have not experienced the isolation and decline in urban schools often associated with northern cities (Shircliffe, 2002).

During this period, where the courts held high standards for school board accountability in maintaining a desegregated system, demands for school choice were viewed as an impediment to integration. In part from using magnet programs to promote educational options, during the 1970s, many civil rights leaders were suspicious of school choice. Vouchers in particular were viewed negatively, and civil rights leaders argued that providing parents with tax supported vouchers to attend private schools, first articulated by economist Milton Friedman in the late 1950s, would only serve to subsidize white parents' resistance to school desegregation. In fact, opponents successfully defeated voucher proposals of the 1970s on these grounds as well as the potential church-state issue. It is important to note that not all members of the civil rights community were opposed to establishing alternatives to the traditional public school. Even Kenneth Clark who advocated massive metropolitan desegregation and the abolition of small, thus inefficient, socially homogenous school districts, spoke of the need of establishing "alternatives" to the public education system as a way of introducing competition (Clark, 1967). However, it was not until decades later that the idea of school choice, including vouchers, reemerged in public discussions, most notably during election campaigns, as a remedy for educational disparities resulting from low performing public schools. As Friedman argued in the 1960s, contemporary voucher proponents suggest that low performing public schools would become obsolete if they had to compete with high performing public and private schools.

The contemporary movement toward school choice via charter schools, vouchers, and controlled choice plans, raises questions about school district accountability toward desegregation. Though civil rights leaders favor desegregation plans involving school choice, such as magnet programs, they are concerned about the issue of accountability once districts are relieved from court oversight and begin implementing school choice plans. Interestingly, not all school districts the courts have granted unitary status initially desired release from court oversight. For instance, Hillsborough County school officials did not initially seek unitary status when they set out to reorganize the school system because the absence of federal court supervision makes the district vulnerable to future lawsuits. Nevertheless, the trend toward court releasing districts from oversight has increased in the past decade. It is important to stress that the end of court oversight does not end a school board's responsibility to maintain a desegregated school system. The following looks at recent issues with respect to school choice and unitary status, noting implications.

Unitary Status. Desegregation monitoring, as noted, has been in the process of being phased out for the past ten years. School districts that have been under court supervision for a reasonable period of time and have shown compliance with the equal protection clause are increasingly found to have made a good faith effort to assure equity and access in schools. Miami-Dade County public school system, the nation's 4th largest, was granted unitary status after 31 years of court oversight. U.S. District Judge William Dimitrouleas found the district's good faith commitment to the constitutional rights of students was shown in decades of compliance with court orders. Demographics reveal a majority-minority population in the district. Fifty-four percent of the 360,000 students are Hispanic, 32 percent are African American and 12 percent are white. Civil rights advocates called the ruling regressive, and stated that there will be no supervision and no control over the hiring of teachers and assigning of students on a community basis ("Florida School Desegregated, Judge Says," 2001). The Miami-Dade Case shows a major demographic trend in the nation's largest school population centers that are the results of increased racial and cultural diversity. In major population centers whites are a minority as in Los Angeles.

Federal Judge Peter J. Messitte ended 30 years of court supervision of Prince George's County School System in Maryland. In 1972 Prince George County School District was required to implement cross-county busing of more than 33,000 students to achieve racial equity. Today the county, one of the wealthiest predominantly black counties in the nation, has a population 60 percent African-American. Seventy seven percent of the school system's 77,000 students are African-American. The judge dismissed a lawsuit filled against the district by the NAACP but appointed a monitor to oversee the school district (*Arkansas Gazette*, 2002).

The Little Rock, Arkansas School District remains under a Federal Monitor. School district officials are working to achieve unitary status. Howell and Dishongh (2002) provide insights into some of the challenges in achieving unitary status. The Little Rock School District petitioned the court to declare the district unitary and release it from court supervision. A week long hearing was conducted to determine whether the state's largest school district has complied with terms of the 1998 desegregation plan, entitling the district to be released from over 40 years of federal court involvement in the district's operations. A ruling is expected by mid-November, 2002. At stake is the district's future autonomy in budgeting, school construction, student's assignments to schools as well as staffing. In addition, if the district is declared desegregated by 2004 the state will forgive a $20 million loan and continue financing magnet schools through 2008. African Americans attending the flagship Central High School told a federal district judge, Bill Wilson, Jr. that the campus is really two institutions. One made up of white students taking rigorous courses and the other comprised mainly of African Americans students taking regular courses taught by a less nurturing faculty. Ending Federal Court Supervision will not lessen School Districts obligation to continue monitoring compliance with unitary status and desegregation requirements.

Race Choice. *Your School and the Law* (2002) reported on attacks on the Massachusetts voluntary 1965 state desegregation law. The law encouraged Lynn and other districts to adopt student assignment policies, which use race as a factor in determining where students attend schools. Questions about the legality of using race as a factor in determining where students attend school to achieve overall racial balance are being raised by some parents. In *Comfort v. Lynn School Committee* mostly white parents are suing for discrimination against their children, preventing them from attending better performing schools. When students enter Lynn's schools, parents must identify their child's race. Some racially mixed parents choose white or black depending on which they think will help them get their school choice. Fifty-eight percent of Lynn's students are minorities, while 42 percent are white. Among the minorities, 29 percent are Hispanic, 15 percent are African American and 14 percent are Asian American.

Vouchers and School Choice. As noted earlier, vouchers and school choice are current popular educational themes. The Supreme Court June 27, 2002 in a 5-4 (Sandra Day O'Connor, Antonin Scalia, Anthony Kennedy, William Rehnquist, and Clarence Thomas ruled for the majority) decision ruled that using state and federal funds for attendance at private and private religious schools does not violate the constitution. The *Zelman v. Simmons-Harris* (2002) case was limited to the Cleveland, Ohio voucher case but several states and several faith based groups sought to implement voucher programs after the court's ruling. Clint Bolick, of the Institute for Justice, who served as co-counsel before the Supreme Court, found conditions ripe for expansion of similar programs after the ruling. Lampman (2002) reported on African-American parents' discontent with inner city schools and the preference of a growing Muslim population to send their children to private religious schools, as fueling a movement toward support for extended voucher programs. Observers raise the question as to whether those seeking equal treatment in funding private religious school with government funds are willing to take equal treatment in regulation and accountability. Justice Stephen Breyer, in his strong dissent, focused on the role of the First Amendment in protecting the nation's social fabric from religious conflict. Justice David Souter is his bitter dissent noted that " public tax money will pay at a systemic level for teaching the covenant with Israel and Mosaic law in Jewish schools, the primacy of the Apostle Peter and the Papacy in Catholic schools, the truth of reformed

Christianity in Protestant schools, and the revelation to the Prophet in Muslim schools, to speak only of major religious groupings in the Republic" (Frieden, 2002; 536 U.S__. 2002). Opponents of vouchers include The National Education Association, The American Federation of Teachers, The American Civil Liberties Union, and the People for the American Way. Proponents such as Jan LaRue, chief counsel for Concerned Women for America noted that Justice Thurgood Marshall stated in Witters v. Washington (1986) "in this case, the fact that aid goes to individuals means that the decision to support religious education is made by the individual, not the state," (Green, 2002). Bush's nomination of Michael McConnell, a constitutional scholar and lead proponent of funding to religious groups, to the 10th Circuit Court of Appeals may signal a conservative shift. However, with mid-term elections nearing, and a razor thin majority in Congress, appointments to federal courts may be subjected to increased scrutiny from public school advocates. Terry M. Moe (2002), senior fellow at the Hoover Institution and professor of political science at Stanford University, believes vouchers are inevitable as democratic constituencies in inner cities demand school choice.

The battle for separation of church and state appears to be headed toward the states whose constitutions have strong first amendment protections. Florida is the home of the first statewide voucher program in the United States. Florida, according to Richard (2002), has a record number of students including those with disabilities using an expanded menu of state-financed vouchers to enroll in private schools. Florida Circuit Judge P. Kevin Davey ruled August 5 that the voucher program violates the state constitution. Governor Jeb Bush is appealing the ruling to the State Supreme Court. This suggests the next battlefield over vouchers will be in the state courts. The Associated Press (2002) reported that the Maine Department of Education and local school districts continue to enforce state law that forbids tuition payment to religious schools, according to Maine Attorney General Steven Rowe. Rowe finds the Supreme Court ruling stipulates that states may fund parochial schools, but it did not address the issue of whether they are required to do so. Advocates and opponents will continue the debate in the future. School choice advocates often equate vouchers with tuition tax credits, but tuition tax credits may help middle class taxpayers and not low-income inner city populations ("Editorial" *USA Today*, July 23, 2002). Others believe that combining tax credits with vouchers can help parents improve the quality of instruction in public schools. Tax-credit funds can be used for tutors, transportation to out of district public schools, and help overcrowding in inner city schools. Cummings (2002) reports that President Bush has been shifting his emphasis from vouchers to tax credits which give taxpayers a break on their income taxes for money spent on school tuition. It also comes with less political challenge and pundits believe is more politically saleable. Bush still has vouchers in his message to compassionate conservatives, his power base.

Rulings and Trends: In *Johnson ex rel. Johnson v. Board of Education of Champaign Unit School District* #4 (2002), the court entered a consent decree approving a "controlled choice" plan allowing assignment of elementary students to the school of their choice anywhere in the city, subject to racial fairness guidelines, despite a claim that the plan unfairly required busing of African-American students. Opponents of the plan had objected that a shortage of classrooms in the predominantly north side of the city disproportionately imposed busing obligations on African American students. Despite the objections, the court found that all African-American students selecting schools within walking distance of home were accommodated, and plans were in place to increase north side school facilities (*School Law Reporter*, 2002).

Future. In Little Rock, as other school districts under court supervision or in unitary status, statistics are continually gathered to monitor compliance with desegregation orders. Analysis of percentage of disciplinary cases, grade assignments, achievement levels and advanced class placement are a few of the items used to determine compliance. As desegregation in the nation's schools is achieved, funds can be utilized to increase equity and access across all population groups. School districts must confront social economic and racial segregation in schools as a barrier to equity and excellence. Many districts have put forward school choice, including vouchers, charter schools, and magnet programs as a means to expand educational options to students and parents, raise academic standards and achievement, and foster desegregation.

Cobb (2002) notes that while the National Association for the Advancement of Colored People still states their commitment to desegregation, there has been a noticeable shift in the organization's focus to look at ways to improve minority students' academic performance other than maintaining a racial balance in schools. In addition, a 1998 survey by the Public Agenda Foundation revealed 80 percent of African-American parents and 88 percent of white parents viewed raising academic standards and achievement as more important for schools than integration. The relationship between raising academic achievement and school integration is often lost in such surveys, however. There is substantial evidence that racial segregation concentrates poverty in high minority schools, and these schools tend to be low performing. Social economic and racial segregation have impeded several school districts' attempts to bolster academic standards and achievement (raise test scores). Stephen Imoff, a school board member of Jefferson County, Kentucky, has even purposed assigning students to schools on the basis of their socio-economic background so that no school has a low-income majority student body. Imoff argues limiting the number of low- income students at each school will raise test scores and student achievement. Massive use of transportation would be needed to achieve Imoff's goal, making his plan perhaps unappealing to some parents (Kenning, 2002)

Along with desegregation measures, charter schools and vouchers, more popular with parents, will continue to be debated as efforts are made to "leave no child behind." School choice advocates believe public schools will be improved with competition. Henry (2002) points to a variety of school choice options. There are some 2430 charter schools in 34 states serving 580,000 students with mixed results. Over 1, 100 magnet schools with arts, business, science and technology curriculum serve students effectively. Tutoring programs provide another student option. Deregulation, so popular in the Reagan philosophy, has led to increased competition in business and industry. Some see benefits in such a philosophy while others believe deregulation has led to ethical and moral lapses as corporate leaders seek to improve their bottom line through creative accounting. School choice efforts expand this deregulatory trend that to date has led to inconclusive results in academic achievement. The law has been a vital instrument in expanding the nation's social consciousness and providing for increased educational opportunities for minorities. In school districts that have unitary status, school officials need to assure parents and educators that they would continue the use of magnet programs to attract students outside their home communities as well as fulfill mandates of the equal protection clause. However, in the Miami-Dade school district unitary ruling, Judge Dimitrouleas while giving the district flexibility to use race-conscious measures to avoid resegregation, limited such efforts to next June and rejected an extension of that deadline (CNN.Com).

Concentrating on providing excellent education, encouraging students to succeed, to the degree possible, maximizing fiscal policy results, jawboning parents or guardians to get involved in their children's educational efforts, encouraging volunteerism, and community involvement together with court supervision where necessary will yield positive outcomes. A perusal of the Education Law Association's *School Law Reporter* in the last few years shows a variety of creative efforts to achieve equal access and equity in school enrollment. As in *Parents Involved in Community School v. Seattle School District No 1* (2001) the court held that the school district plan for open choice served compelling governmental interests in achieving diversity and reducing the efforts of *de facto* segregation and was narrowly tailored to further those interests. Several cases deal with school assignment, which in time may take a secondary position to concentration on educational excellence and best practices for all students.

George W. Bush and Congressional Act 2001 to leave no child behind legislation will be a goal for school districts in the future. Funding problems in a cyclical economy will be a challenge requiring federal intervention. A variety of strategies to assure access and opportunity including double incentive magnet schools will be utilized in the future.

School district efforts to assure quality education for all students including minorities and students at risk continue to be a work in progress. Substantial personal changes in educational administrators, lawyers, law enforcement agencies, require school boards to represent the community in monitoring educational quality. A Harvard University Civil Rights Project, *Resegregation in American Schools* (2002) suggests a variety of strategies to assure quality education. These include community involvement through petitions, press conferences, rallies to monitor school policies after unitary status.

References:

"A better class of teachers," (2002, July 5). *Wall Street Journal*: A 12.

"In Maine vouchers still illegal," (2002, July 16). Associate Press. *The Christian Science Monitor*: 13.

Clark, K. (1967). " Alternative public school systems—A response to America's educational emergency," *ERIC document

Cobb, Kim (2002, June 3). "Civil rights group split as priorities are changed," *Houston Chronicle.com*. http://www.chron.com/cs/CDA/story.hts/special/deseg/1433460.

Comfort v. Lynn School Committee, 150 F. Supp. 2d 285; 2001 U.S. Dist. (2001. June 29)

Cummings, J. (2002, July 3). "Bush revisits school-voucher issue with focus on tuition tax credit," *Wall Street Journal*: A 4.

Desegregation, (2001, August). *Educational Law Reporter*: 123.

Parents Involved in Community School v. Seattle School District No. 1. 137 F. Supp.2d 1224 (WD. Wah.2001).

"Desegregation of Public Educatio," (2002). *The Catalog of Federal Domestic Assistance,"* http://www.cfda.gov/public/viewprog.

"Florida school desegregated, judge says," (2001, July 2). *Arkansas Democrat Gazette*: 2A.

Frieden, Terry (2002, June 27). "Supreme Court affirms school voucher program," *http://www.cnn.com/2002/LAW/06/27/scotus.school.vouchers/*

Gibson v. Board of Public Instruction of Dade County. 272 F.2d 763 (5th Cir. 1959).

Green, Tanya L. (2002, June 27)." Supreme Court ruling 'Super Bowl' for voucher," *Concerned Women for America* http://www.sefa.org/library/education/2002-06-27_school_choice.shtml

Green v. New Kent County School Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716 (1968)

Henry, T. (2002, February 20), " Supreme Court weights school choice," http://www.usatoday.com/life/academic/2002/2002-02-20-voucher.htm

Henry v. Clarksdale Municipal Separate School District. 433 F.2d 387 (5h Cir.1970).

Howell, C. & Dishongh, K. (2002, July 24). "Blacks tell U.S. Judge about LR school woes," *Arkansas Democrat Gazette*: 1A, 5 A.

Johnson ex rel. Johnson v. Board of Education of Champaign Unit School District #4. 188 F. Supp.2d 944 (C.D. Illinois 2002).

School Law Reporter. (2002, July). Volume 44, No. 7, 114.

"Judge lifts court order on desegregation". (2002, June 27). *Arkansas Democrat Gazette*: 2A.

"Judge: Miami-Dade Desegregated, 31 Years Later," *CNN.Com.* *http://fyi.cnn.com/2001/fyi/teachers.ednews/07/01/miami*

Lampman, J. (2002, July 2). "Voucher win's ripple effect on faith groups," *The Christian Science Monitor*: 2.

Kenning, C. (2002, September 1). "Income may impact student assignments," *The Courier-Journal*: 1.

Moe, T. M. (2002, July 2). "Vouchers constitutional and inevitable," *The Christian Science Monitor*: 9.

Oakley, M. (2002, August 14). "Education equity vs. local funding," *Arkansas Democrat Gazette*: 5B.

Parents Involved in Community schools v. Seattle School District #1, 285 F.3d 1236 (9th Cir.2002).

"Resegregation in American schools," (2002, September 8). *The Civil Rights Project Harvard University*. http://www.law.edu/civilrights/alerts/reseg.html

Richard, A. (2002, September 4). "Florida sees surge in use of Vouchers," *Education Week*: 1, 34.

Shircliffe, B. (2002)." Desegregation and the historically black high school: the establishment of Howard W. Blake in Tampa, Florida," *The Urban Review* v. 34 no2 (June 2002) p. 135-58

Singleton v. Jackson Municipal Separate School District. 348 F. (2d) 729 (1965). 355 F(2d) 865 (1966).

Swann v. Charlotte-Mecklenburg Board of Education. 402 U.S. 1. 91 S.Ct. 1267 (1971).

"Target vouchers to help kids," (2002, July 23). *USA Today Editorial*: 12 A.

United States v. Jefferson County Board of Education. (*Jefferson I*), 372 F.2d 836 (5th Cir. 1966).

"Voluntary state desegregation law, school district policies under attack in Massachusetts," (2002, June 19) *Your School and the Law*: 1, 5.

Witters v. Washington Department of Services for the Blind. 474 U.S.481 (1986).

Zelman v. Simmons-Harris. 122 S.Ct.2460.153 L.Ed.2d 604 (2002).

School Issues under § 504 and the ADA: The Latest and Greatest

Steven R. Aleman
Attorney at Law
1813 Cedar Ave., Ste. A
Austin, TX 78702

Fall 2002

School Issues Under Section 504 And The ADA: The Latest And Greatest

Steven R. Aleman
Attorney at Law
Austin, Texas

The focus of this presentation is on the administrative enforcement of Section 504 of the Rehabilitation Act of 1973 (§ 504) and Title II of the Americans with Disabilities Act (ADA) by the Office for Civil Rights (OCR), U.S. Department of Education, in the elementary and secondary education context. This session will highlight recent OCR guidance and rulings of interest to administrators, advocates and attorneys. This paper is a companion piece to *Student Issues on § 504/ADA: The Latest and Greatest*, by Perry A. Zirkel, at the 48th Annual Education Law Association (ELA) conference.[i]

Compliance with § 504 and the ADA continues to involve debate and dialog on balancing the interest in protecting and serving individuals with disabilities with concern over creating and conferring unfair advantages or unnecessary accommodations. The presenter will comment on how OCR had addressed balancing the rights of students with disabilities.

Background

In the OCR Report to Congress for fiscal year 2000, the agency reported that 55 percent of its caseload was devoted to § 504/ADA complaint investigations.[ii] Investigations are managed through a complaint resolution process that involves both OCR attorneys and investigators working with educators and families. Typically, OCR cases conclude with either a letter of finding or a complaint resolution letter (sometimes with an attached voluntary resolution agreement).[iii] OCR employs a network of 12 regional offices across the nation to conduct its enforcement activities.[iv]

Selected OCR Guidance

This part summarizes the most recent OCR policy guidance on the application of § 504/ADA to elementary and secondary educational institutions.[v]

Protecting Students with Disabilities: Frequently Asked Questions about Section 504 and the Education of Children with Disabilities

Source: http://www.ed.gov/offices/OCR/504faq.html

This web-based resource provides OCR's answers to 45 common questions about § 504 in the schools. It addresses the areas of § 504's relationship to the Individuals with Disabilities Education Act (IDEA), the scope of § 504 eligibility, evaluations under § 504, placement decisions and procedural safeguards. Highlights of OCR's interpretative guidance include:

- If a student qualifies for services under both the IDEA and § 504, a school district must only develop an individualized education program (IEP) under the IDEA; a separate § 504 plan is not required.
- Section 504's definition of a student with a disability does not exclude current users of alcohol. However, § 504 allows schools to take disciplinary action against students with disabilities using drugs or alcohol to the same extent as students without disabilities.
- A physician's medical diagnosis does not suffice as an evaluation but should be considered among other sources in evaluating a student with a disability or student believed to have a impairment which substantially limits a major life activity.
- If a student with a disability transfers to a district from another school district with a § 504 plan, the receiving district should review the plan and supporting documentation. If a group of persons at the receiving school district, including persons knowledgeable about the meaning of the evaluation data and knowledgeable about the placement options determines the plan is appropriate, the district is required to implement the plan in the proper placement.
- Section 504 requires districts to provide notice to parents explaining any evaluation and placement decisions affecting their children, the parents' right to review educational records and the parents' right to appeal any decision regarding evaluation and placement through an impartial hearing.

OCR Cases of Interest

This part summarizes selected OCR cases against local school districts and other entities subject to OCR jurisdiction. Because of the volume of decisions issued by OCR, a full treatment of all of them is not possible here. The author has picked those cases that will facilitate discussion over the direction of § 504/ADA administrative enforcement.

Waiver of Regular High School Diploma Requirements

The nation is placing more emphasis on accountability for educational results such as through the No Child Left Behind Act (Pub. L. 107-110). How should OCR balance the interest in ensuring reasonable accommodations in testing while the education system strives toward greater accountability? These cases illustrate how OCR has tackled student requests to waive high school exit exam requirements.

Georgia Department of Education

Citation:	35 Individuals with Disabilities Educ. L. Rep. (LRP) ¶ 195 (OCR March 26, 2001) (No. 04-01-1021)
Issue:	Whether the state education department discriminated against a student with a disability when it denied his request for a waiver from a state requirement that a student must pass the state graduation assessment in order to receive a high school diploma.
Ruling:	OCR held that the state education department did not violate § 504/ADA. The state education department denied the student's waiver request on the grounds that it believed the student would pass the state assessment with additional remediation or tutorial classes. OCR learned that the student had enrolled in remediation classes in his home district. OCR interviewed the student's treating physician who concurred that the student might pass with additional remediation given that the cognitive impact of his disability had now been mitigated with medication.

Fort Wayne (IN) Community Schools

Citation:	36 Individuals with Disabilities Educ. L. Rep. (LRP) ¶ 214 (OCR Feb. 13, 2002) (No. 05-01-1214)

Issue:	Whether the school district discriminated against a student with a disability when it denied his request for a waiver from a requirement that the student must pass the graduation qualifying examination in order to receive a high school diploma.
Ruling:	OCR held that the district did not violate § 504/ADA. The school considered for the student alternative pathways to a diploma that did not require passing the graduation qualifying examination. The student did not qualify for an alternative pathway to a diploma because the courses he took, while appropriate to his needs, were not at the required proficiency level.

Charter Schools

The charter school reform movement continues to grow as states seek to offer choices to parents. How should OCR balance the interest in protecting the rights of students with disabilities while recognizing the instructional freedom and flexibility inherent in the charter school concept? These cases show the enforcement issues that OCR has confronted in charter schools.

PEAKS Charter School (MN)

Citation:	35 Individuals with Disabilities Educ. L. Rep. (LRP) ¶ 37 (OCR Dec. 13, 2000) (No. 05-00-1189)
Issue:	Whether the charter school failed to provide a facility that was accessible to persons with mobility impairments and failed to provide accessible transportation to school and to off-campus school activities?
Ruling:	The charter school and OCR entered into a voluntary resolution agreement to end the investigation over accessibility of the school's programs and activities for persons with mobility impairments. Among other things, the charter school agreed that all modifications or alterations made would be in accordance with the Americans with Disabilities Act Accessibility Guidelines (ADAAG) or the Uniform Federal Accessibility Standards (UFAS). To ensure that students with mobility impairments have access to all programs and activities offered by the school, the school committed that the van used for transporting these students will be in good repair.

Coeur d'Alene Charter Academy (ID)

Citation:	35 Individuals with Disabilities Educ. L. Rep. (LRP) ¶ 280 (OCR Oct. 5, 2001) (No. 10-01-1184)

Issue: Whether the charter school failed to evaluate and appropriately serve students with disabilities?

Ruling: The charter school and OCR entered into a voluntary resolution agreement to end the investigation over provision of appropriate services to students with disabilities and proper evaluations. Among other things, the charter school agreed to review and revise its § 504/ADA policies and procedures. The charter school also agreed to train staff on § 504/ADA requirements.

Extracurricular Activities

Extracurricular activities are an important part of a student's school experience. How should OCR balance the interest in providing access and an opportunity to participate in extracurricular activities for students with disabilities without unduly imposing upon schools and other students involved? These sample cases demonstrate OCR's approach in this kind of dispute.

Marion County (FL) School District

Citation: 37 Individuals with Disabilities Educ. L. Rep. (LRP) ¶ 13 (OCR Nov. 21, 2001) (No. 04-01-1301)

Issue: Whether the school district denied a student with a disability an equal opportunity to participate in the tryouts for the cheerleader squad?

Ruling: The district and OCR entered into a voluntary resolution agreement to end the investigation over the conduct of the cheerleader tryouts. Among other things, the district agreed that it would develop procedures that specify that students with disabilities are entitled to necessary related aids and services and/or program modification in order to accomplish the objective of equal opportunity to participate in extra curricular and interscholastic programs. The district promised that if the student tries out for the cheerleading squad, the district would provide the student with effective accommodations, including but not limited to, the opportunity to videotape the cheerleading sponsor's instructions and demonstrations.

Moses Lake (WA) School District No. 161

Citation: 36 Individuals with Disabilities Educ. L. Rep. (LRP) ¶ 218 (OCR Feb. 7, 2002) (No. 10-01-1213)

Issue: Whether the school district denied an opportunity for a student with a disability to compete for a position on the cheer team?

Ruling: The district and OCR entered into a voluntary resolution agreement to end the investigation over the selection process for the cheer team. Among other things, the district agreed that at the next available opportunity for students to compete for positions on the cheer team, the selection process would be conducted in such manner as is necessary to afford the student with a disability an equal opportunity to participate in the process. If the student chooses to compete for a position on the cheer team, she will be provided appropriate accommodations.

Class Grades

Grades as measures of academic success and their use in gaining further educational opportunities are a big concern to parents and students. How should OCR balance adapting classroom grading methods without interfering with the utility of grades as a uniform gauge of student progress? These are the latest OCR grading cases.

Triton (MA) Regional School District

Citation: 35 Individuals with Disabilities Educ. L. Rep. (LRP) ¶ 256 (OCR May 30, 2001) (No. 01-01-1044)

Issue: Whether the school district failed to revise the student's quarter grades as permitted under the student's IEP.

Ruling: OCR held that the district did not violate § 504/ADA. The school's interpretation of the IEP was that final grades that fell below a "B" would be adjusted to reflect the work the student completed over the summer. The IEP did not require that all of the student's grades for every quarter that fell below a "B" would be revised upward as a result of the work he completed over the summer.

Clover Park (WA) School District No. 400

Citation: 36 Individuals with Disabilities Educ. L. Rep. (LRP) ¶ 246 (OCR Feb. 6, 2002) (No. 10-02-1015)

Issue: Whether the school district failed to fully implement the student's individualized education program (IEP) during the current school year resulting in the student's low grade.

Ruling: OCR held that the district did not violate § 504/ADA. The school provided bimonthly progress report for core subjects per the IEP, reassigned him to a different teacher and added a study skills period. The steps taken by the district benefited the student's academic progress. Further, the student was not prevented from participating in athletics because of his grades.

Discipline

Safe schools and fair student discipline are a priority for both educators and parents. How should OCR balance the interest in preventing discriminatory punishment without creating a perceived double standard for students with disabilities? Some recent OCR cases covering discipline are below.

Aurora (CO) Public Schools

Citation:	36 Individuals with Disabilities Educ. L. Rep. (LRP) ¶ 188 (OCR June 28, 2001) (No. 08-01-1051)
Issue:	Whether the school district failed to follow proper procedures during the manifestation determination process?
Ruling:	OCR held that the district violated § 504/ADA. The school refused to provide the student's parents with a requested copy of an incident report utilized at a manifestation determination review meeting. The school's refusal to turn over the incident report denied the student's parents with the opportunity to examine a relevant record in connection with a placement decision. The district should have provided the incident report to the parents prior to the manifestation meeting.

Independent School District #204 (MN)

Citation:	37 Individuals with Disabilities Educ. L. Rep. (LRP) ¶ 75 (OCR April 11, 2002) (No. 05-02-1016)
Issue:	Whether the school district discriminated against a student with a disability by imposing discipline on him while not imposing discipline on a student without a disability involved in the same incident?
Ruling:	OCR held that the district did not violate § 504/ADA. The school principal relied upon a teacher who witnessed the incident. The discipline imposed was substantially consistent with the school's handbook. In prior incidents, students without disabilities were disciplined in the same fashion.

End Notes

[i] The Perry A. Zirkel paper, *Student Issues on § 504/ADA: The Latest and Greatest*, is available in the ELA conference material.

[ii] The percentage of OCR cases raising § 504/ADA issues was actually higher than 55 percent because that figure does not include those cases where multiple claims were presented (e.g., disability and racial discrimination allegations). The fiscal year 2000 Report to Congress is the most current available on the OCR web site (www.ed.gov/offices/OCR).

[iii] For a comprehensive treatment of OCR letters of finding and complaint resolution letters, see Perry A. Zirkel and Steven R. Aleman, *Section 504, the ADA and the Schools* (2000 + 2001 Supp.) (LRP Publications).

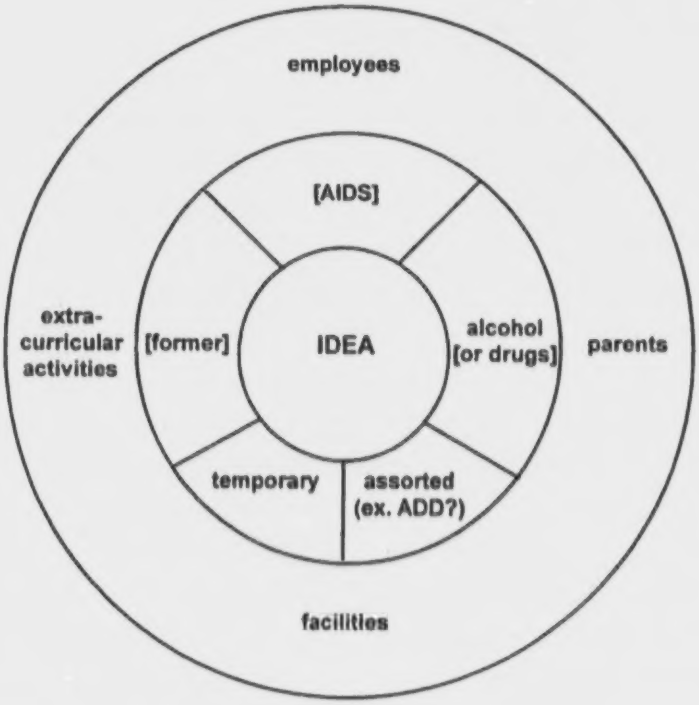
[iv] For readers covered by the OCR regional office in New York City, please note that it was relocated due to the September 11th tragedy. You may check the OCR web site (www.ed.gov/offices/OCR) or contact the OCR national headquarters in Washington, DC at 1-800-421-3481 or 877-521-2172 (TDD) to confirm the New York regional office phone number and mailing address.

[v] For older OCR policy guidance, see Perry A. Zirkel and Steven R. Aleman, *Section 504, the ADA and the Schools* (2000 + 2001 Supp.) (LRP Publications).

§504/ADA Student Issues: The Latest and Greatest

Perry A. Zirkel
University Professor of Education and Law
Lehigh University
111 Research Drive
Bethlehem, PA 18015
(tel. 610/758-3239)
(e-mail: paz0@lehigh.edu)

© 2002



Presentation for the Annual Conference of the Education Law Association
New Orleans November 2002

9/15/02

247

The Latest and Greatest on 504/ADA[1]

Perry A. Zirkel
University Professor of Education and Law
Lehigh University

© 2002

Recent case law within and outside the school context has revised or at least refined various concepts concerning eligibility and other k-12 student issues under Sec. 504 and the ADA.[2] A lá Letterman, here is my top-ten list of these concepts and their underlying court decisions. Just as long as they heed the warning against over-generalizing these results in terms of factual and jurisdictional boundaries, readers can benefit from these case-based lessons.

1. ***The frame of reference for determining "substantially limits" in the definition of disability is horizontal and national.***

   Contrasted with the primarily vertical frame of reference for the IDEA definition of "specific learning disability" (SLD), which is the individual's achievement in relation to his/her ability, the basis for calculation under Sec. 504 and the ADA is the average person, or most people, in the general population.[3] The supporting caselaw has arisen not only in the analogous areas of employment[4] and higher education,[5] but also the direct context of k-12 education.[6]

2. ***Moreover, the determination of "substantially limits" is with, not without, mitigating measures.***

   Resolving the split in lower court caselaw and minimizing the interpretation of the EEOC, the Supreme Court recently concluded, in a triad of private sector employment cases that appear to be directly applicable to the k-12 student context, that the determination of whether an individual has a disability should be made with reference to mitigating measures, such as eyeglasses and medication.[7]

3. ***Providing a "504 Plan" for a student who may be eligible under the IDEA can lead to costly consequences.***

   In one case, the Second Circuit granted tuition reimbursement to the parents of a student to whom the district offered a 504 Plan after concluding, wrongly, that she did not meet the IDEA definition of emotional disturbance.[8] In an earlier case, the Eighth Circuit granted transition services, attorneys fees and costs to an orthopedically impaired child whom the district had exited from special education upon the completion of her physical education coursework but continued to provide with various instructional accommodations and related services.[9]

4. *Conversely, providing a "504 Plan" as, in effect, a consolation prize for a student who is not eligible under the IDEA may also have costly consequences.*

In a New Jersey case, the federal district court upheld tuition reimbursement for the parents of an ADHD child to whom the district, after defensibly determining lack of eligibility under the IDEA, had provided a rather extensive 504 Plan.[10]

5. *The majority standard for liability under Sec. 504 and the ADA appears to be bad faith or gross misjudgment.*

Several circuits have concluded that liability under Sec. 504 and the ADA requires proof at bad faith or gross misjudgment.[11] Some courts have interpreted this standard as applicable in Sec. 504 and ADA cases regardless of the relief sought.[12] The Supreme Court's recent ruling that rejected disparate impact analysis under Title VI,[13] which is an arguably analogous civil rights act, seems to support such a high standard for relief under Sec. 504 and the ADA. Moreover, where the standard is met, the Supreme Court even more recently clarified that only compensatory, not punitive, damages are available under Sec. 504 and the ADA.[14]

6. *With a limited exception, school officials in their individual capacity may not be liable under Sec. 504 or the ADA.*

A federal district court recently held that school officials in their personal capacity are beyond the reach of Sec. 504 and the ADA for the respective reasons that they do not receive federal funds and are not public entities.[15] The limited exception is where the individual is in the position to accept federal funds.[16] Another possible exception is for retaliation cases.[17]

7. *The most recent cases may possibly signal a trend in favor of student-athletes in Sec. 504 or ADA cases against rules, without waivers, of interscholastic athletic associations.*

Like the professional golfer Casey Martin,[18] high school interscholastic athletes with disabilities have prevailed against waiver-less, absolute eligibility rules in recent cases.[19] However, the decreasing split in the recent,[20] as compared to the earlier,[21] case law will not necessarily be resolved entirely in the students' favor, depending on whether modifying or waiving the disputed rule would constitute a fundamental alteration. The Supreme Court decision in the *Martin* case seems to suggest that the first question is whether the disputed rule concerns an essential (analogous to widening the hole in golf) or a peripheral (analogous to waiving the walking-only requirement) feature. Second, if a peripheral, rather than indispensable, feature, Sec. 504 and the ADA require an individualized determination as to whether the modification or waiver is not only reasonable and necessary, but also preserving the valid purpose(s) of the rule.

8. *The exhaustion doctrine applies to FAPE cases brought by "pure" Sec. 504 students.*

The courts have been expansive with regard to applying the exhaustion requirement in FAPE cases including those for students covered by Sec. 504/ADA but not the IDEA.[22] In contrast, the courts have largely found this doctrine inapplicable in facilities accessibility[23] and other non-FAPE cases regardless of whether the child is purely Sec. 504 or double-covered.[24]

9. *Sec. 504 or ADA suits may have a long "shelf life," including a longer statute of limitations than that for IDEA suits.*

Depending on the state law used by analogy, the statute of limitations for Sec. 504 or ADA cases may be two to six years, which is often longer than that for IDEA cases.[25] Moreover, in some jurisdictions, the period does not toll until the child reaches the age of majority.[26] Thus, the "shelf life" for Sec. 504 and ADA cases may be long.

10. *States may be immune to liability for money damages under the ADA and, less likely, under Sec. 504.*

The Supreme Court, in a 5-to-4 decision, recently ruled that Congress' attempted abrogation of the states' Eleventh Amendment immunity was ineffective for Title I of the ADA, which is specific to employment.[27] Although there is some support for extending the Supreme Court's ADA Title I analysis to ADA Title II,[28] which applies to governmental entities, this issue is not clearly settled. The possibility of Eleventh Amendment immunity in relation to Sec. 504 is slimmer. In a controversial and complicated decision, a three-judge panel of the Eighth Circuit held that Sec. 504 did not validly abrogate the state education department's Eleventh Amendment immunity and that the purported waiver, upon receiving federal funds, was "impermissible coercion"[29]; however, upon review *en banc* the entire membership of the Eighth Circuit reversed this waiver analysis.[30] Inasmuch as school districts are considered part of the state for Eleventh Amendment purposes in only a few states, such as California and Maryland, the school-related effect of these rulings is largely limited to state departments of education.[31]

The rulings in other recent decisions merit at least *Honorable Mention.*

- the Supreme Court recently issued an ADA ruling beyond the k-12 context that served as a reminder of the LRE, or integration, standard in relation to segregated settings[32]
- a recent court decision interpreted the ADA as having a lower causation standard than Sec. 504[33]
- another recent case serves as a reminder of the limited exemption under Sec. 504 and the ADA for discipline of students who are nonfunctional alcoholics[34]
- the Supreme Court recently rejected the catalyst theory in ADA (any, by implication, in Sec. 504) cases[35]
- a federal trial court recently incorporated the IDEA meaningful benefit standard with the Sec. 504 reasonable accommodation standard[36]

End Notes

[1] This paper is an updated version of an earlier article. Perry Zirkel, Section 504 and the ADA: The Top Ten Recent Concepts/Cases, 147 Ed.Law Rep. [761] (2000).

[2] For an earlier sampling of case law, see Perry Zirkel, *Section 504: The New Generation of Special Education Cases*, 85 Ed.Law Rep. [601] (1993). For an analysis of the corresponding OCR rulings, see Perry Zirkel, *Section 504 and Public School Students: An Empirical Overview*, 120 Ed.Law Rep. [369] (1997). For a comprehensive treatment that is currently being updated, see PERRY ZIRKEL AND STEVEN ALEMAN, SECTION 504, THE ADA, AND THE SCHOOLS (2000 + 2001 Supp.)(LRP Publications).

[3] Also in contrast to SLD under the IDEA, the frame of reference is learning, not particular functions or subjects. *See, e.g.*, Pacella v. Tufts Univ. Sch. of Dental Med., 66 F. Supp. 2d 234 (D. Mass. 1999); *cf.* Toyota Motor Mfg. v. Williams, 534 U.S. 184 (2002)(manual tasks must be central to most people's daily lives); Land v. Baptist Med. Ctr., 164 F.3d 423 (8th Cir. 1999)(eating generically, not eating a specific food). *But cf.* Weixel v. Board of Educ., 287 F.3d 138 (2d Cir. 2002)(attending school as a major life activity?); Bartlett v. New York State Bd. of Law Examiners, 226 F.3d 69 (2d Cir. 2000)(reading); T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997)(behavioral control).

[4] *See, e.g.*, McCleary v. National Cold Storage, Inc., 67 F. Supp. 2d 1288 (D. Kan. 1999); Brooks v. Harvest States Coop., 10 NDLR ¶ 62 (E.D. La. 1997); *see also* 29 C.F.R. § 1630.2(j)(1)(I)(EEOC's ADA Title I regulation)("significantly restricts the individual's ability to perform a major life activity as compared to the ability of the "average person in the general population ... [to] perform that same ... activity"); *cf.* 28 C.F.R. §1630.3(j)(3)(I)(ADA Title I regulation specifically for the major life activity of "working"); *cf.* 28 C.F.R. §§ 35.104 App. A, at 470, App. B., at 611 ("in comparison to most people") (DOJ's ADA Titles II and III interpretative guidance). *But cf.* Kohn v. AT&T Corp, 58 F. Supp. 2d 393 (D.N.J. 1999)(average person with comparable training, skills and abilities); *see also* 29 C.F.R. § 1630.3(j)(3)(i)(EEOC's ADA Title I regulations specifically for the major life activity of "working").

[5] *See, e.g.*, Betts v. Rector and Visitors of the Univ. of Virginia, 113 F. Supp. 2d 970 (W.D. Va. 2000); Gonzalez v. National Bd. of Med. Exam'rs, 60 F. Supp. 2d 703 (E.D. Mich. 1999); Price v. National Bd. of Med. Exam'rs, 966 F. Supp. 419 (S.D. W.Va. 1997)("most people"); *cf.* Bartlett v. New York State Bd. of Law Exam'rs, 226 F.3d 69 (2d Cir. 2000)(professional licensing).

[6] *See, e.g.*, Costello v. Mitchell Pub. Sch. Dist. 79, 266 F.3d 916 (8th Cir. 2001); Bercovitch v. Baldwin Sch., Inc., 133 F.3d 141 (1st Cir. 1998)(private school); Ballard v. Kinkaid Sch., 147 F. Supp. 2d 603 (S.D. Tex. 2001)(private school – passing grades); T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997); *cf.* Benik v. Lisle Community Sch. Dist., 30 IDELR 663 (N.D. Ill. 1999)(court used high test scores and GPA to conclude that the student received an appropriate education). However, at least according to a recent professional licensing decision, overreliance on standardized test score results, particularly based on a specific cut-off point, is suspect. *See* Bartlett v. New York State Bd. of Law Exam'rs, 21 NDLR ¶ 160 (S.D.N.Y. Cir. 2001).

[7] Murphy v. United Parcel Serv., 527 U.S. 516 (1999); Sutton v. United Air Lines, Inc., 527 U.S. 471 (1999); Albertsons, Inc. v. Kirkingburg, 527 U.S. 555 (1999). Mitigating measures do not necessarily include an individual's compensatory strategies. *See, e.g.,* Bartlett v. New York State Bd. of Law Exam'rs, 21 NDLR ¶ 160 (S.D.N.Y. Cir. 2001); Finical v. Collections Unlimited, Inc., 65 F. Supp. 2d 1032 (D. Ariz. 1999), *cf.* Root v. Georgia State Bd. of Veterinary Med., 114 F. Supp. 2d 1324 (N.D. Ga. 2000). For refusal or failure to follow the prescribed regimen of the mitigating measure, such as medication, see, e.g., Hein v. All American Plywood Co., 232 F.3d 482 (6th Cir. 2000); Hooper v. Saint Rose Parish, 205 F. Supp. 2d 926 (N.D. Ill. 2002); Tangires v. Johns Hopkins Hosp., 79 F. Supp. 2d 587 (D. Md. 2000); *see also* Capizzi v. County of Placer, 135 F. Supp. 2d 1105 (E.D. Cal. 2001)(mitigation required as a matter of "reasonable diligence"); Nawrot v. CPC Int'l, 18 NDLR ¶ 167 (N.D. Ill. 2000)("distorted result ... [where] the judge pretends that the plaintiff is always clothed with those measures"). Another recent private sector employment case demonstrates that the presence of a mitigating measure does not necessarily mean that the individual will fail to qualify as having a disability. *See* Otting v. J.C. Penney Co., 223 F.3d 704 (8th Cir. 2000)(despite medication and surgery, employee's epilepsy substantially limited her walking, seeing, and speaking). For pertinent education employment cases, see, e.g., Taylor v. Phoenixville Sch. Dist., 113 F. Supp. 2d 770 (E.D. Pa. 2000)(factual issue whether school secretary with bipolar disorder was substantially limited with medication); Schumacher v. Souderton Area Sch. Dist., 163 LRRM 2461 (E.D. Pa. 2000)(jury question whether teacher's ADHD, controlled by medication, is substantial limitation); Brown v. Holy Name Church, 80 F. Supp. 2d 1261 (D. Wyo. 2000)(teacher was not substantially limited after hip-replacement surgery). For relevant higher education cases, see, e.g., Garcia v. State Univ. of New York Health Sci. Ctr., 19 IDELR ¶ 57 (E.D.N.Y. 2000)(factual question requiring individualized determination), *aff'd on other grounds*, 280 F.3d 98 (2d Cir. 2001). For a k-12 student case, see, e.g., Ballard v. Kinkaid Sch., 147 F. Supp. 2d 603 (S.D. Tex. 2001)(Irlen lenses).

[8] Muller v. Committee on Special Educ., 145 F.3d 95 (2d Cir. 1998). As a related matter, the Office for Civil Rights has opined that a child who is covered by IDEA as well as Section 504 is not entitled to a 504 plan where the district has offered an IEP. See Response to McKethan, 25 IDELR 295 (OCR 1996). Finally, an IEP may well suffice for the entitlement under Section 504 for districts that, for whatever reason, choose that route. *See, e.g.*, J.D. v. Pawlett Sch. Dist., 224 F.3d 60 (2d Cir. 2000).

[9] Yankton Sch. Dist. v. Schramm, 93 F.3d 1369 (8th Cir. 1996).

[10] Borough of Palmyra Bd. of Educ. v. F.C., 2 F. Supp. 2d 637 (D.N.J. 1998). *But cf.* J.D. v. Pawlett Sch. Dist., 224 F.3d 60 (2d Cir. 2000)(IEP was reasonable accommodation); Molly L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 422 (E.D. Pa. 2002)(proposed 504 plan was reasonable accommodation); Grant v. St. James Parish Sch. Bd., 33 IDELR ¶ 212 (E.D. La. 2000)(proposed 504 plan); Benik v. Lisle Community Unit Sch. Dist. No. 202, 30 IDELR 663 (N.D. Ill. 1999)(504 plan was sufficient). For a summary of the more complete story in *Palmyra*, see Perry Zirkel, *A Two-Headed Monster*, 81 PHI DELTA KAPPAN 410 (1998). The related problem is whether the "child find" obligation under Sec. 504 is robust. *Compare* W.B. v. Matula, 67 F.2d 484 (3d Cir. 1995), *with* T.J.W. v. Dothan City Bd. of Educ., 26 IDELR 999 (M.D. Ala. 1997).

[11] *See, e.g.*, Smith v. Special Sch. Dist. No. 1, 184 F.3d 764 (8th Cir. 1999); Sellers v. School Bd., 141 F.3d 524 (4th Cir. 1998), *cert. denied*, 119 S. Ct. 168 (1999); Wenger v. Canastota Cent. Sch. Dist., 979 F. Supp. 147

(N.D.N.Y. 1997), *aff'd mem.*, 181 F.3d 84 (2d Cir. 1999); M.P. v. Independent Sch. Dist. No. 721 (200 F. Supp. 2d 1036 (D. Minn. 2002); Butler v. South Glens Falls Cent. Sch. Dist., 106 F. Supp. 2d 420 (N.D.N.Y. 2000). *But see* Ridgewood Bd. of Educ. v. N.E., 172 F.3d 238 (3d Cir. 1999); W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995); O.F. v. Chester Upland Sch. Dist., 32 IDELR ¶ 114 (E.D. Pa. 2000); J.F. v. School Dist., 32 IDELR ¶ 93 (E.D. Pa. 2000); *cf.* Smith v Maine Sch. Administrative Dist. No. 6, 34 IDELR ¶ 201 (D. Me. 2001)(deliberate indifference).

[12] *See, e.g.*, Timothy H. v. Cedar Rapids Community Sch. Dist., 178 F.3d 968 (8th Cir. 1999); Keith v. Allen, 28 IDELR 1203 (8th Cir. 1998); K.U. v. Alvin Indep. Sch. Dist., 491 F. Supp. 599 (S.D. Tex.), *aff'd mem.*, 166 F.3d 341 (5th Cir. 1998); Prins v. Independent Sch. Dist. No. 761, 27 IDELR 312 (D. Minn. 1997); A.W. v. Marlborough Co., 25 F. Supp. 2d 27 (D. Conn. 1998).

[13] Alexander v. Sandoval, 532 U.S. 275 (2001).

[14] Barnes v. Gorman, 122 S. Ct. 2097 (2002).

[15] Magagna v. Salisbury Township Sch. Dist., 29 IDELR 725 (E.D. Pa. 1998); *see also* Smith v. Maine Sch. Administrative Dist. No. 6, 34 IDELR ¶ 5 (D. Me. 2001); Berthot v. Stadler, 19 NDLR ¶ 164 (E.D. La. 2000); Lemire v. Silva, 104 F. Supp. 2d 80 (D Mass. 2000); Scott C. v. Bethlehem Area Sch. Dist., 33 IDELR ¶ 93 (E.D. Pa. 2000); J.F. v. School Dist., 32 IDELR ¶ 93 (E.D. Pa. 2000); Schumacher v. Souderton Area Sch. Dist., 163 LRRM 2461 (E.D. Pa. 2000). *But cf.* W.B. v. Matula, 67 F.3d 484 (3d Cir. 1995)(qualified immunity).

[16] *See, e.g.*, Lee v. Trustees of Dartmouth College, 958 F. Supp. 37 (D.N.H. 1997); Guckenberger v. Boston Univ., 957 F. Supp. 306 (D. Mass. 1997).

[17] *Compare* Gupta v. Montgomery County Pub. Sch., 25 IDELR 115 (D. Md. 1996) *with* Baird v. Rose, 192 F.3d 462 (4th Cir. 1999); Boe v Allied Signal, 20 NDLR ¶ 111 (D. Kan. 2001). In comparison, supervisors are not liable via the doctrine of respondeat superior under § 504 or the ADA. *Gupta*, 25 IDELR at 117.

[18] PGA Tour, Inc. v. Martin, 532 U.S. 661 (2001).

[19] *See, e.g.*, Washington v. Indiana High Sch. Athletic Ass'n, 181 F.3d 840 (7th Cir.), *cert. denied*, 528 U.S. 1046 (1999); Kling v. Mentor Pub. Sch. Dist., 34 IDELR ¶ 148 (N.D. Ohio 2001); Bingham v. Oregon Interscholastic Activities Ass'n, 37 F. Supp. 2d 1189 (D. Or. 1999). As a direct result of the *Martin* decision, a federal court recently required the athletic association to develop and implement a waiver-hearing procedure to determine whether the requested modification was necessary, reasonable, and not a fundamental alteration of the competition. Cruz v. Pennsylvania Interscholastic Athletic Ass'n, 157 F. Supp. 2d 485 (E.D. Pa. 2001).

[20] For recent decisions adverse to the plaintiff-student, see Paul v. Henrico County Pub. Sch., 32 IDELR ¶ 173 (E.D. Va. 2000)(enrollment requirement); Eagle Union Community Sch. Dist., 28 IDELR 1138 (Ind. SEA 1998), *aff'd on other grounds sub nom.* P.J. v. Eagle Union Community Sch. Dist., 31 IDELR ¶ 108 (7th Cir. 2000)(athletic team membership). Recent court decisions also represent mixed results on the direct threat, or risk of injury, defense based at least in part on the specific facts. *Compare* Inskip v. Astoria Sch. Dist., 30 IDELR 398 (D. Or. 1999), *with* Doe v. Woodford, 213 F.3d 921 (6th Cir. 2000). For a related illustration, a federal court recently refused a preliminary injunction sought by a student with a disability whom the administration suspended from the lacrosse and football team for violating the school's code of conduct. Long v. Board of Educ., 167 F. Supp. 2d 988 (N.D. Ill. 2001).

[21] *Compare, e.g.*, Sandison v. Michigan High Sch. Athletic Ass'n, 64 F.3d 1026 (6th Cir. 1995); Pottgen v. Missouri State High Sch. Athletic Ass'n, 40 F.3d 926 (8th Cir. 1994); Beatty v. Pennsylvania Interscholastic Athletic Ass'n, 24 IDELR 1146 (M.D. Pa. 1996); Reaves v. Mills, 904 F. Supp. 120 (W.D.N.Y. 1995); M.H. v. Montana High Sch. Ass'n, 25 IDELR 42 (D. Mont. 1995), *with* Dennin v. Connecticut Interscholastic Athletic Conference, Inc., 913 F. Supp. 663 (D. Conn.), *vacated as moot*, 94 F.3d 96 (2d Cir. 1996); Johnson v. Florida High Sch. Athletic Ass'n, 899 F. Supp. 579 (M.D. Fla. 1995), *vacated as moot*, 102 F.3d 1172 (11th Cir. 1996); University Interscholastic Athletic League v. Buchanan, 848 S.W.2d 298 (Tex. Ct. App. 1993). For a comprehensive overview, see Kathleen Sullivan, Patricia Lantz & Perry Zirkel, *Leveling the Playing Field or Leveling the Players?* 33 J. SPECIAL EDUC. 258 (2000).

[22] *See, e.g.*, Cudjoe v. Independent Sch. Dist. No. 12, 37 IDELR ¶ 91 (10th Cir. 2002); Babicz v. School Bd., 135 F.3d 1420 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 53 (1999); Eads v. Unified Sch. Dist. No. 289, 184 F. Supp.2d 1122 (D. Kan. 2002); DeVaux v. Vallas, 35 IDELR ¶ 5 (N.D. Ill. 2001); Benik v. Lisle Community Unit Sch. Corp., 30 IDELR 124 (N.D. Ill. 1999); Thomas v. East Baton Rouge Sch. Bd., 29 F. Supp. 2d 337 (M.D. La. 1998); *cf.* Rose v. Yeaw, 214 F.3d 306(1st Cir. 2000)(mixed issues); Weber v. Cranston Sch. Comm., 212 F.3d 41 (1st Cir. 2000)(retaliation). *But see* J.F. v. School Dist., 32 IDELR ¶ 93 (E.D. Pa. 2000); *cf.* O'Hayre v Board of Educ., 33 IDELR ¶ 94 (D. Colo. 2000)(harassment and discriminatory discipline). As a partially related matter, some courts have even required exhaustion where the plaintiff was seeking money damages under § 504 or the ADA in a jurisdiction where it is unavailable under the IDEA. *See, e.g.*, Charlie F. v. Board of Educ., 98 F.3d 989 (7th Cir. 1996); W.L.G. v. Houston County Bd. of Educ., 975 F. Supp. 1317 (M.D. Ala. 1997); Koopman v. Fremont County Sch. Dist. No. 1, 911 P.2d 1049 (Wyo. 1996); *cf.* Praino v. Board of Educ., 25 IDELR 972 (2d Cir.), *cert. denied*, 522 U.S. 888 (1997); Pullen v. Botetourt County Sch. Bd., 23 IDELR 607 (W.D. Va. 1997); Prins v. Independent Sch. Dist. No. 761, 23 IDELR 544 (D Minn. 1995)(beyond hearing officer's authority). *But see* Glass v Hillsboro Sch. Dist. 1J, 33 IDELR ¶ 244 (D. Or. 2000); McKay v. Winthrop Bd. of Educ., 26 IDELR 1100 (D. Me. 1997); Jeffery Y. v. St. Mary's Area Sch. Dist., 967 F. Supp. 852 (W.D. Pa. 1997).

[23] *See, e.g.*, Bechtel v. East Penn Sch. Dist., 20 IDELR 892 (E.D. Pa. 1994)(accessibility). The determination may depend on whether the case issue is characterized as FAPE or not. *Compare* Gaudiello v. Delaware County Intermediate Unit, 796 F. Supp. 849 (E.D. Pa. 1992)(service animal as subsidiary to FAPE/LRE) *with* Sullivan v. Vallejo City Unified Sch. Dist., 731 F. Supp. 947 (E.D. Cal. 1990)(service animal in terms of accessibility).

[24] *See, e.g.*, Moubry v. Independent Sch. Dist. No. 696, 951 F. Supp. 867 (D. Minn. 1996). *But cf.* Kielbus v. New York City Bd. of Educ., 140 F. Supp. 2d 248 (E.D.N.Y. 2001)(participation in non-IDEA programs).

[25] *See, e.g.*, Jeremy H. v. Mount Lebanon Sch. Dist., 95 F.2d 272 (3d Cir. 1996); Smith v. Special Sch. Dist. No. 1, 24 IDELR 1003 (D. Minn. 1996), *aff'd on other grounds*, 184 F.3d 764 (8th Cir. 1999); Andalusia City Bd. of Educ., 916 F. Supp. 1179 (N.D. Ala. 1996). However, in some states, this plaintiff advantage is not the case. *See, e.g.*, Bernard v. School Bd., 58 F. Supp. 2d 669 (E.D. Va. 1999); James v. Upper Arlington City Sch. Dist., 987 F. Supp. 1017 (S.D. Ohio 1997).

[26] *See, e.g.*, Hickey v. Irving Indep. Sch. Dist., 976 F.2d 980 (5th Cir. 1992); McKellar v. Commonwealth, 29 IDELR 1064 (E.D. Pa. 1999); Smith v. Special Sch. Dist. No. 1, 24 IDELR 1003 (D. Minn. 1996), *aff'd on other grounds*, 184 F.3d 764 (8th Cir. 1999). Whether tolling applies may depend on the nature of the relief sought. *See, e.g.*, Wadsworth City Sch., 31 IDELR ¶ 224 (Ohio SEA 1999).

[27] Garrett v. University of Alabama at Birmingham, 531 U.S. 356 (2000).

[28] Reickenbacker v. Foster, 22 NDLR ¶ 85 (5th Cir. 2001); Thompson v. State of Colorado, 258 F.3d 1241 (10th Cir. 2001); Doe v. Barger, 193 F. Supp. 2d 1112 (E.D. Ark. 2002); Biggs v. Board of Educ., 36 IDELR ¶ 124 (D Md. 2002); Lieberman v. State of Delaware, 21 NDLR ¶ 220 (D. Del. 2001); *cf.* Garcia v. SUNY Health Sci. Ctr., 280 F.3d 98 (2d Cir. 2001)(standard of discriminatory animus or ill will).

[29] Bradley v. Arkansas Dep't of Educ., 189 F.3d 745 (8th Cir. 1999), *rehearing en banc granted on this issue only*, 197 F.3d 958 (8th Cir. 1999). Earlier, the Eighth Circuit reached the same result the same result, with the waiver analysis being irrelevant, for the ADA. Alsbrook v. City of Maumelle, 184 F.3d 999 (8th Cir. 1999), *cert. granted*, 120 S. Ct. 1003, *cert. dismissed*, 120 S. Ct.1265 (2000); *cf.* Erickson v. Board of Governors for Northeastern Illinois Univ., 17 NDLR ¶ 168 (7th Cir. 2000).

[30] Jim C. v. United States, 235 F.3d 1079 (8th Cir. 2001), *cert. denied*, 121 S. Ct. 2591 (2001) (ruled that by accepting federal funding, state state's education department waived its Eleventh Amendment immunity); *see also* Robinson v. Kansas, 295 F.3d 61 (10th Cir. 2002); A.W. v. Jersey City Pub. Sch., 37 IDELR ¶ 8 (D.N.J. 2002); Patrick W. v Lemahieu, 165 F. Supp. 2d 1144 (D. Hawaii 2001). Earlier cases rather summarily rejected such immunity. *See, e.g.*, Emma C. v. Eastin, 985 F. Supp. 940 (N.D. Cal. 1997); *cf.* J.B. v. Valdez, 130 F.3d 1280 (10th Cir. 1999). For a more recent case that ruled in favor of immunity to Section 504, merely as summary consequence to the court's ADA Title II analysis, see Biggs v. Board of Educ., 36 IDELR ¶ 124 (D. Md. 2002).

[31] Of course, it directly affects state education institutions. *See, e.g.*, Doe v. Barger, 193 F. Supp. 2d 1112 (E.D. Ark. 2002)(state school for the deaf).

[32] Olmstead v. L.C., 527 U.S. 581 (1999)(held that the ADA required states to place an adult with a mental disability in a community, rather than institutionalized, setting if a such a placement is appropriate, is not opposed by the adult with a disability, and can be reasonably and equitably accommodated in light of the needs of "a large and diverse population of persons with mental disabilities"). *But cf.* St. Johnsbury Acad. v. D.H., 34 IDELR ¶ 32 (2d Cir. 2001)("qualified" is lower requirement in private than in public elementary/secondary schools).

[33] Baird v. Rose, 192 F.3d 462 (4th Cir. 1999). The causation element has been decisive in some Sec. 504 cases. *See, e.g.*, Doe v. Eagle Union Community Sch. Corp., 101 F. Suppp.2d 707 (S.D. Ind. 2000).

[34] Stearns v. Board of Educ., 31 IDELR ¶ 134 (N.D. Ill. 1999).

[35] Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services, 532 U.S. 598 (2001).

[36] Molly L. v. Lower Merion Sch. Dist., 194 F. Supp. 2d 322 (E.D. Pa. 2002).

FERPA Update 2002: The two new Supreme Court FERPA cases, and post-9/11 Congressional balancing of student privacy and safety interests

Professor Lynn M. Daggett, J.D., Ph.D.
Gonzaga School of Law
P.O. Box 3528
Spokane, WA 99220
(509) 323-6400
ldaggett@lawschool.gonzaga.edu

© Lynn Daggett 2002. All rights reserved.

Congress enacted FERPA in 1974 as a floor amendment to a comprehensive education statute. Almost thirty years later, FERPA has evolved into a large, complex, and confusing body of law. Until 2002 persons trying to understand and comply with FERPA were without guidance from the Supreme Court, which from 1974 to 2001 did not hear a single FERPA case. In its 2001-2002 term, however, the Supreme Court decided two FERPA cases: the *Falvo* case holding that peer grading of classroom work does not involve "education records" and thus does not violate FERPA, and the *Gonzaga* case holding that FERPA can not be enforced under Section 1983, a federal civil rights statute. Moreover, soon after September 11, Congress amended FERPA to permit somewhat broader disclosure of records in connection with terrorism concerns. This paper addresses these (and, briefly, other) recent FERPA developments.

FERPA OVERVIEW

FERPA, 20 U.S.C. §1232g, is Spending Clause legislation. As a condition on the receipt of federal education funds, schools (both public and private, preschool, K-12 and post-secondary) must agree to comply with its terms. FERPA's requirements may be boiled down to four essential ones:

1. Parents/adult students have the right to access their own education records.
2. In general (and with more than a dozen exceptions) schools cannot disclose education records or their contents to third parties without the written consent of the parent/adult student.
3. If a parent/adult student believes their education records to be inaccurate or invasive of privacy, the school must offer an internal hearing.
4. Schools must provide parents/adult students with an annual notice of their FERPA rights.

Several sources provide overviews and/or commentary on FERPA.[1]

CONGRESS AND FERPA

In the last year, Congress has amended FERPA to address terrorism-related investigations. Congress has also enacted two other statutes which address FERPA issues.

I Student records and terrorism-related investigations.

As has been discussed elsewhere, FERPA was originally enacted as a floor amendment to a larger piece of legislation. FERPA has been amended many times, but always as a small piece of much larger bills. Congress continued this approach by amending FERPA in a single small section of the extensive, post 9/11 USA Patriot Act (PL 107-56).[2] Specifically, Section 507 of the USA Patriot Act adds a new section (j) to FERPA concerning subpoenas of student records in the context of terrorism-related investigations. The federal Department of Education has not yet enacted regulations to implement new section (j), but has issued a detailed letter of guidance.[3]

---

[1] For overviews of FERPA, *see* Family Policy Compliance Office Website, www.ed.gov/Offices/OM/fpco. (includes text of regulations, model policies, letters of finding); National Center for Education Statistics, Protecting the Privacy of Student Records: Guidelines for Education Agencies (NCES 1997), available at http://nces.ed.gov/pubs97/97527.html. (comprehensive overview of FERPA and sample forms); James Rapp, Education Law, vol.1-7 (Matthew Bender 2000) (Section 13.04 is a comprehensive overview of FERPA. Section F7.03 has sample student records forms and policies; section T7 lists state student records laws); John Theumann, Annotation: Construction and Application of Family Educational Rights and Privacy Act of 1974 (20 U.S.C.A.. §1232g), 112 A.L.R.Fed. 1 (1993). For academic commentary on FERPA *see* Thomas Baker, Inaccurate and Misleading: Student Hearing Rights under FERPA, 114 West Educ. L. Rep. 721 (1997); Lynn Daggett, Bucking Up Buckley I: Making the Federal Student Records Statute Work, 46 Cath. U. L. Rev. 617 (1997) (overview of FERPA and suggestions for change); Lynn M. Daggett and Dixie Snow Huefner Recognizing Schools' Legitimate Educational Interests: Rethinking FERPA's Approach to the Confidentiality of Student Discipline and Classroom Records, 51 American Law Review 1-48 (2001) (discussion of the 10th Circuit decision in *Falvo* and the *Miami U.* discipline records case); Lynn Daggett, Bucking Up Buckley II: Using Civil Rights Claims to Enforce the Federal Student Records Statute, 21 Seattle L. Rev. 29 (1997) (overview of remedies under FERPA); Maureen Rada, The Buckley Conspiracy: How Congress Authorized the Cover-Up of Campus Crime and How it Can be Undone, 59 Ohio St. L.J. 1799 (1998) (discussing the Ohio Supreme Court decision in the Miami University case); Dixie Snow Huefner and Lynn M. Daggett, FERPA Update: Balancing Access to and Privacy of Student Records, 152 Education Law Reporter 469-91 (2001) (updated overview of FERPA).

[2] The complete text of FERPA's new section is as follows:
"j) Investigation and prosecution of terrorism
(1) In general
Notwithstanding subsections (a) through (i) or any provision of State law, the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General) may submit a written application to a court of competent jurisdiction for an ex parte order requiring an educational agency or institution to permit the Attorney General (or his designee) to--
(A) collect education records in the possession of the educational agency or institution that are relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of Title 18, or an act of domestic or international terrorism as defined in section 2331 of that title; and
(B) for official purposes related to the investigation or prosecution of an offense described in paragraph (1)(A), retain, disseminate, and use (including as evidence at trial or in other administrative or judicial proceedings) such records, consistent with such guidelines as the Attorney General, after consultation with the Secretary, shall issue to protect confidentiality.
(2) Application and approval

At first blush, the new section (j) appears to add little. In general FERPA requires schools to give parents notice before complying with a subpoena (such subpoenas are hereinafter referred to as "general subpoenas").[4] However, FERPA also provides that courts (and federal grand juries) may issue subpoenas of student records for law enforcement purposes, and that these law enforcement subpoenas may direct the school to keep them confidential even as to the involved student/parents (such subpoenas are hereinafter referred to as "confidential law enforcement subpoenas").[5]

FERPA's new section (j) added by the USA Patriot Act concerns subpoenas of student records for terrorism-related investigations (such subpoenas are hereinafter referred to as "confidential terrorism investigation-related subpoenas"). Like the pre-existing confidential law enforcement subpoena language, new section (j) limits confidential terrorism investigation-related subpoenas to those issued by courts. Normally the application to the court for the subpoena will be by the U.S. Attorney General's Office.[6] However, the Attorney General's Office does not have the power to access student records on its own, a court-issued subpoena must be obtained.

Presumably, even before the addition of new section (j), the Attorney General's Office could have utilized the existing confidential law enforcement subpoena provision to obtain court-issued subpoenas of student records which directed schools to keep the subpoena's existence and contents confidential, even as to the involved student/parents. However, the new section (j) changes the law governing subpoenas of FERPA records in several

---

(A) In general
An application under paragraph (1) shall certify that there are specific and articulable facts giving reason to believe that the education records are likely to contain information described in paragraph (1)(A).
(B) The court shall issue an order described in paragraph (1) if the court finds that the application for the order includes the certification described in subparagraph (A).
(3) Protection of educational agency or institution
An educational agency or institution that, in good faith, produces education records in accordance with an order issued under this subsection shall not be liable to any person for that production.
(4) Record-keeping
Subsection (b)(4) of this section does not apply to education records subject to a court order under this subsection."

[3] FPCO Letter "Recent Amendments to Family Educational Rights and Privacy Act Relating to Anti-Terrorism Activities." April 12, 2002 (available at www.ed.gov/offices/OM/FPCO).

[4] 20 U.S.C. §1232g(b)(2)(B).

[5] 20 U.S.C. §1232g(b)(1)(J).

[6] The statute provides that some other federal employees may apply for confidential terrorism-investigation related subpoenas. The section refers specifically to "the Attorney General (or any Federal officer or employee, in a position not lower than an Assistant Attorney General, designated by the Attorney General)."

respects. First, schools are granted immunity for complying in good faith with subpoenas of student records for terrorism-related investigations. FERPA contains no general good faith immunity provision, nor any specific immunity provision for general subpoenas nor for confidential law enforcement subpoenas. The availability of immunity may serve as an incentive for some schools to comply with the confidential terrorism-related investigation subpoena rather than apply to the court to quash or modify it.

Second, new section (j) explicitly provides that confidential terrorism investigation-related subpoenas are not to be included in FERPA access logs. FERPA requires schools to maintain a log of disclosure requests by outsiders (i.e. persons other than the family or other employees of the school).[7] Access to the log is limited to the family and custodian of records.[8] Not including confidential terrorism investigation-related subpoenas in the access log means, of course, that the family will not be able to learn of the subpoena by accessing the log. Pre-existing FERPA regulations exclude confidential law enforcement subpoenas from access logs, although the statute itself does not explicitly address this issue.[9]

Third, and most significantly, new section (j) provides a lower standard for issuing a confidential terrorism investigation-related subpoena than is used for law enforcement subpoenas generally. A court "shall" issue a confidential terrorism investigation-related subpoena if "there are specific and articulable facts giving reason to believe that the education records are likely to "contain information "relevant to an authorized investigation or prosecution of an offense listed in section 2332b(g)(5)(B) of Title 18, or an act of domestic or international terrorism as defined in section 2331 of that title."

Prior to the enactment of new section (j), schools[10] presented with general subpoenas or confidential law enforcement subpoenas sometimes went to court to ask that the subpoena be quashed or modified. In such cases, courts routinely have inspected the subpoenaed records in camera, and balanced the student's privacy interests with the subpoenaer's need for the records.[11] The result of this in camera review and balancing is often a quashing or limiting of the subpoena. It is unclear whether schools presented with confidential terrorism investigation-related

---

[7] 20 U.S.C. §1232g(b)(4)(A).

[8] *Id.*

[9] 34 C.F.R. §99.32(d)(5) excludes from FERPA access logs: "A party seeking or receiving the records as directed by a Federal grand jury or other law enforcement subpoena and the issuing court or other issuing agency has ordered that the existence or the contents of the subpoena or the information furnished in response to the subpoena not be disclosed."

[10] Or, in the case of general FERPA subpoenas, the family of the student whose records were subpoenaed would sometimes go to court.

[11] See, e.g., Venson v. State, 74 F.3d 1140 (11th Cir. 1996) (*in-camera* review of student records in a criminal trial to discover any exculpatory material to be released to the defendant); Gillard v. Boulder Sch. Dist., 2000 WL 1269747 (D. Colo. 2000) (protective order keeping student records confidential in a student tort claim against a school).

FERPA subpoenas will choose to go to court to seek this in camera review and balancing of interests. The statutory grant of immunity for good faith compliance with such subpoenas may influence schools to comply without prior court review. If schools do ask courts to review confidential terrorism investigation-related FERPA subpoenas, it is unclear whether courts will perform an in camera review and balancing test. There are media reports of libraries applying to courts to quash or modify USA Patriot Act subpoenas of library records, with some success.[12]

II Access to students and student information by military recruiters.

While not actually amending FERPA's language, Congress has effectively modified FERPA's directory information provisions as regards secondary schools and military recruiters. Existing FERPA law permits schools to designate categories of certain not-too-private information (such as names and addresses and degrees received) as directory. Once a school designates categories of information as directory, and so notifies families and gives them a chance to object, the school may choose to release directory information about non-objecting students to persons or entities of its choosing.[13] Thus, for example, a school could choose to release an honor roll or dean's list (of non-objecting students' names) to the local newspaper if it followed the above-described procedure for designating student honors and awards as directory information.

In contrast to existing directory information language, which permits but does not require schools to release directory information, Congress now requires, as a condition of receipt of federal ESEA funds, public and private secondary schools to release to requesting military recruiters lists of names, addresses and telephone numbers of students who have not filed objections.[14] Prior to this most recent amendment, Congress had provided

---

[12] *See, e.g.*, "USA Patriot Act casts doubt on what we once took for granted," Spokesman Review September 10, 2002 at A1 and A5 (reporting that the King County, WA Library successfully asked a court to quash an FBI subpoena of all its information on a terrorism suspect).

[13] 20 U.S.C. §1232g(a)(5); 34 C.F.R. §§ 99.3; 99.37.

[14] The actual statutory language is as follows:

"(c) ACCESS TO SECONDARY SCHOOLS.–(1)(A) Each local educational agency receiving assistance under the Elementary and Secondary Education Act of 1965–
"(i) shall provide to military recruiters the same access to secondary school students as is provided generally to postsecondary educational institutions or to prospective employers of those students; and
"(ii) shall, upon a request made by military recruiters for military recruiting purposes, provide access to secondary school student names, addresses, and telephone listings, notwithstanding section 444(a)(5)(B) of the General Education Provisions Act (20 U.S.C. 1232g(a)(5)(B)).
"(B) A local educational agency may not release a student's name, address, and telephone listing under subparagraph (A)(ii) without the prior written consent of a parent of the student if the student, or a parent of the student, has submitted a request to the local educational agency that the student's information not be released for a purpose covered by that subparagraph without prior written parental consent. Each local education agency shall notify parents of the rights provided under the preceding sentence.".

PL 107-107 (2002), to be codified at 10 U.S.C. § 503(c). (While beyond the scope of this paper, the

the military with the "same access to . . . directory information. . . as is provided generally to employers and post-secondary institutions." Now the military has a right of access no matter what a school does for employers and colleges. This amendment appears to make the military the only entity aside from parents with a FERPA right of access. Other FERPA provisions for nonconsensual access (e.g. to other employees within a school with a legitimate educational interest, or to a new school to which the student is transferring) are discretionary: the school has the authority but not the obligation to release the records without written consent from the family.

A few schools are excluded from these provisions: those schools which "by majority vote of the[ir] governing body" have a policy denying recruiting access or access to directory information, and private schools which have a documented religious objection to military service.[15]

Schools are required to notify parents of their right to object to release. It is unclear whether a general directory information objection suffices to remove a student from lists given to military recruiters, or whether a specific military recruiting information objection must be made. The safe approach would appear to be for schools in their annual FERPA notifications to inform families of the school's obligations with respect to military recruiters, and to afford them a chance to object either generally to releasing directory information to all persons, or specifically to release of information to military recruiters.

III. Sharing of disciplinary records of transferring students as a means of combating student drug use

In the omnibus No Child Left Behind Act, Congress amended the Safe and Drug Free Schools and Communities Act ("SDFSCA") concerning the sharing of disciplinary records of students who transfer between schools. Apparently based upon the premise that when a student with a disciplinary record transfers to a new school, the new school should know of the student's history, public schools are now specifically authorized to use SDFSCA funds for "[e]stablishing or implementing a system for transferring suspension and expulsion records, consistent with [FERPA], by a local educational agency to any public or private elementary school or secondary school."[16] Moreover, states are required by January 2004 to have a system in place to "facilitate the transfer of

---

amendment also requires school to afford the military access to recruiting functions such as college fairs.)

[15] 10 U.S.C. §503(c)(5), as amended by PL 107-107.

[16] The actual statutory language reads as follows:
"(2) AUTHORIZED ACTIVITIES.--Each local educational agency, or consortium of such agencies, that receives a subgrant under this subpart may use such funds to carry out activities that comply with the principles of effectiveness described in subsection (a), such as the following . . . .
(E) Drug and violence prevention activities that may include the following:. . .
(xvi) Establishing or implementing a system for transferring suspension and expulsion records, consistent with section 444 of the General Education Provisions Act (20 U.S.C. 1232g), by a local educational agency to any public or private elementary school or secondary school."
PL 107-110, to be codified at 20 USC §7115.

disciplinary records, with respect to a suspension or expulsion, by local educational agencies to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends, or is instructed to enroll, on a full- or part-time basis, in the school."[17]

THE SUPREME COURT AND FERPA

From 1974, the year of FERPA's enactment, until 2002, the Supreme Court never heard a FERPA case. In 2002, after essentially ignoring FERPA for over 25 years, the Court decided not one but two FERPA cases in the same 2001-2002 term. In *Owasso Indep. Sch. Dist. No I-011 v. Falvo*, the Court held that the practice of peer grading did not violate FERPA. In *Gonzaga University v. Doe,* the Court held that FERPA violations are not actionable under 42 U.S.C. §1983 (hereinafter "Section 1983").

I. Owasso Indep. Sch. Dist. No I-011 v. Falvo

A. The issue

In pertinent part, FERPA defines "education records" as those "maintained" by a school or by "a person acting for" the school.[18] The 10th Circuit unanimously held in *Falvo* that the peer graded papers, although never actually turned in to the teacher, were "maintained" education records since the grades on them were recorded in the teacher's grade book.[19] The 10th Circuit also held that the student peer graders were persons "acting for" the school, although not of course employees. Although no other federal courts had ruled on this issue, the Supreme Court granted certiorari. The Supreme Court unanimously held that peer grading of papers in a public elementary school did not violate FERPA, deciding that this scenario did not involve FERPA "education records."[20]

B. The facts

In a public elementary school in Oklahoma, students graded one another's papers. After grading the papers, they were returned to the student, who then called out the grade to the teacher to record in her grade book. At this point each student was free to take her own paper home. Thus, the teacher never actually had possession of the papers. The school did not obtain parent consent to this practice, which would have avoided any FERPA problems. A parent challenged the peer grading practice as a FERPA violation. Part of the parent's concern stemmed from the stigma she perceived this practice inflicted on one of her children, who was disabled.[21] Specifically, the parent claimed that the peer grading and calling out of grades resulted in class-wide knowledge of the (sometimes not excellent) grades her child received. However, the parent did not include an IDEA, Section 504, or ADA disability discrimination claim, nor a claim that the IDEA's records provisions were violated, in her suit. The parent did assert a constitutional privacy claim, which was rejected by the trial court and the 10th Circuit. The Supreme Court's grant of certiorari was limited to the statutory FERPA issue.

---

[17] The actual statutory language reads as follows:
"SEC. 4155. TRANSFER OF SCHOOL DISCIPLINARY RECORDS.
"(a) NONAPPLICATION OF PROVISIONS.--This section shall not apply to any disciplinary records with respect to a suspension or expulsion that are transferred from a private, parochial or other nonpublic school, person, institution, or other entity, that provides education below the college level.
"(b) DISCIPLINARY RECORDS.--In accordance with the Family Educational Rights and Privacy Act of 1974 (20 U.S.C. 1232g), not later than 2 years after the date of enactment of this part, each State receiving Federal funds under this Act shall provide an assurance to the Secretary that the State has a procedure in place to facilitate the transfer of disciplinary records, with respect to a suspension or expulsion, by local educational agencies to any private or public elementary school or secondary school for any student who is enrolled or seeks, intends, or is instructed to enroll, on a full- or part-time basis, in the school.
PL 107-11, to be codified at 20 U.S.C. §7165.

[18] 20 U.S.C. §1232g(a)(4).

[19] *Falvo v. Owasso Indep. Sch. Dist.*, 233 F.3d 1203 (10th Cir. 2000).

[20] *Owasso Indep. Sch. Dist. v.Falvo,* 122 S.Ct. 934 (2002).

C. The majority opinion

The majority opinion authored by Justice Kennedy is quite brief, comprising about four pages of the Supreme Court reporter. It refers to none of the numerous federal and state court decisions interpreting FERPA. Nor does the majority opinion refer to the disabled status of one of the plaintiff's children -- the majority merely notes that "respondent claimed the peer grading embarrassed her children."[22] As is discussed in more detail below, the Court reserved the question of FERPA's actionability under Section 1983.

On the merits, the Court held that peer graders are not "persons acting for" schools, and that peer graded papers which were never in the teacher's physical possession were not "maintained" by the school. As to who "acts for" a school, the Court held that "[t]he phrase 'acting for' connotes agents of the school, such as teachers, administrators, and other school employees."[23] The Court contrasted these agents with the student peer graders, whom the Court found to be grading for instructional reasons rather than as agents performing a task for the school's benefit.

As for records "maintained" by a school, the Court found that peer graded papers which never were in the physical possession of the teacher were not maintained by the school. The Court reserved the question of whether the graded papers, once in the teacher's possession, would then be "maintained" and subject to FERPA. To arrive at this conclusion, the Court noted that the dictionary defined "maintain" to refer to "keep in existence or continuance; preserve; retain."[24] The Court noted that the results of the peer-graded tests and assignments would be recorded in the teacher gradebook, which the Court noted itself might be excluded from FERPA as a sole possession note. The Court suggested that "maintain" referred to storage of central office files "in a filing cabinet in a records room at the school, or on a permanent secure database. . . ."[25] The Court noted that FERPA also requires schools to "maintain" an access log of disclosures to outsiders, and suggested that it would be unworkable for access logs to be maintained by individual teachers. Finally, the Court suggested that to find peer graded assignments to be FERPA records would create a right to an internal hearing to challenge their accuracy, a result the Court found to be unworkable.

---

[21] *See Falvo*, 233 F.3d 1203, 1208 (10th Cir. 2000) (noting that one of the plaintiff's children was an IDEA student, but rejecting the claim that the IDEA created a constitutional expectation of privacy in that student's education records).

[22] 122 S.Ct at 937.

[23] *Id.* at 939.

[24] *Id.* at 939 (citation omitted).

The Court's reasoning also included consideration of both instructional ramifications and of federalism principles. The Court noted that peer grading was a widespread, accepted instruction practice.[26] The Court recognized the pedagogical benefit of peer grading:

> "Correcting a classmate's work can be as much a part of the assignment as taking the test itself. It is a way to teach the material again in a new context, and it helps show students how to assist and respect fellow pupils. By explaining the answers to the class as the students correct the papers, the teacher not only reinforces the lesson but also discovers whether the students have understood the material and are ready to move on. We do not think FERPA prohibits these *educational techniques*."[27]

The Court also perceived several educational harms to result from holding that FERPA prohibits peer grading:

> "substantial burdens on teachers across the country. It would force all instructors to take time, which otherwise could be spent teaching and in preparation, to correct an assortment of daily student assignments. . . .[and] make it much more difficult for teachers to give students immediate guidance.. . . .[and] force teachers to abandon other customary practices such as group grading of team assignments. . . if a teacher . . . put a happy face, a gold star, or a disapproving remark on a classroom assignment, [FERPA would] not allow other students to see it."[28]

The Tenth Circuit had noted some of these same pedagogical concerns, but found that separation of powers principles required them to leave to Congress any changes to FERPA to improve its instructional ramifications. In contrast, the Supreme Court found these instructional consequences to influence its interpretation of the statute.

Finally, the Court suggested that principles of federalism dictated its holding. The Court indicated that upholding the Tenth Circuit would

---

[25] *Id.* at 939.

[26] *Id.* at 937 ([t]he . . . teachers, like many teachers in this country, use peer grading").

[27] *Id.* at 939 (emphasis added).

[28] *Id.* at 940.

> "effect a drastic alteration of the existing allocation of responsibilities between States and the National Government in the operation of the Nation's schools. We would hesitate to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation."[29]

The Court concluded that

> "We doubt Congress meant to intervene in this drastic fashion with traditional state functions. Under the [Tenth Circuit] interpretation of FERPA, the federal power would exercise minute control over specific teaching methods and instructional dynamics throughout the country."[30]

D. Justice Scalia's concurrence

In a concurring opinion comprising less than a single page of the Supreme Court reporter,[31] Justice Scalia disagreed with the majority's suggestion that FERPA records are limited to those which are centrally maintained. Justice Scalia noted that FERPA's exclusion of sole possession notes (which include certain non-centrally maintained documents such as confidential teacher and counselor notes from meetings with students and perhaps a teacher grade book) would be meaningless if all non-centrally maintained records were excluded by FERPA. The concurrence noted that such a result is inconsistent with basic principles of statutory construction.[32]

The concurring opinion agreed with the majority that while peer-graders are not persons acting for schools and thus papers in possession of the peer graders are not FERPA records. The concurring opinion did not explain its reasoning on this point, except to refer to the "ordinary meaning" of the phrase a "person acting for" a school.

E. How broadly should *Falvo* be read?

The obvious, and troubling, question for education law attorneys and practitioners is just how narrowly or broadly *Falvo* should be read. The Court notes that it "limit[ed] our holding to this narrow point" that "the grades on students' papers would not be covered under FERPA at least until the teacher has collected them and recorded them in his or her grade book."[33] The Court explicitly noted that "[w]e . . . do not decide the broader question whether the grades on individual student assignments, once they are turned in to teachers, are protected by [FERPA]."[34] However, in getting to this "holding on a narrow point," the Court 1) held that student graders were not "persons acting for a school," 2) held that graded assignments not turned in to, but recorded by, a teacher were not records "maintained" by a school, and 3) suggested (albeit in dicta, but repeatedly) that FERPA records were limited to those maintained in a central file. In fact, are FERPA records limited to those kept in a central file? Is student status mutually exclusive with status as a "person acting for" a school? Is physical possession and/or retention a prerequisite for "maintained" education records?

---

[29] *Id.* at 939.

[30] *Id.* at 940.

[31] 122 S.Ct. at 941 (Scalia, J., concurring).

[32] *Id.* (Scalia, J., concurring)(citation omitted).

[33] 122 S.Ct. at 940.

[34] *Id.* at 941.

Some guidance on the central file issue may be had from the Sixth Circuit's post-*Falvo* holding that discipline records are covered by FERPA.[35] Although many discipline records are not maintained in a central file, the Sixth Circuit found that FERPA's records definition "was not content-based" and held that discipline records were covered by FERPA, apparently without regard to whether they were kept in a central file. It is significant that the *Miami* case was brought by the federal government (specifically the Department of Justice) to enforce FERPA, and the federal government argued FERPA includes discipline records, apparently without regard to their location.

II. Gonzaga University v. Doe

A. The issue

In *Falvo*, the Tenth Circuit performed a sua sponte analysis, for jurisdictional purposes, of FERPA's actionability under Section 1983. As had all federal appeals courts which had addressed the issue, the Tenth Circuit held that FERPA violations could form the basis of Section 1983 suits. At the United States Supreme Court, the *Falvo* certiorari petition addressed only the existence of a FERPA violation, and not its actionability under Section 1983. However, one of the amicus briefs urged the Court to address the Section 1983 issue. At oral argument, the Court raised the Section 1983 issue and in its opinion indicated it was reserving the Section 1983 question. In *Gonzaga University v. Doe* (hereinafter *"Gonzaga"*) the Court was asked to squarely address this issue as well as the Washington Supreme Court's holding that Gonzaga, a private Jesuit school, was acting under color of state law. The Court took certiorari of the case, but limited to the Section 1983 issue.[36] A majority of the Court held in *Gonzaga* that FERPA claims were not actionable under Section 1983.[37]

B. The facts

The *Gonzaga* case arose when school officials attempted to deal with a claim that one of its undergraduate students had raped another student. The alleged victim later recanted her rape claim. The student suspected of rape was in Gonzaga's teacher certification program. State law requires teacher preparation programs to certify to the state that a candidate is of good moral character. In conjunction with preparing this character reference, Gonzaga employees discussed the situation, including the accused student's name, with an official at the state department of education.

---

[35] *U.S. v. Miami University*, 294 F.3d 797 (2002).

[36] It is unfortunate the Court did not hear the under color of state law issue. Finding a private Jesuit university supplying information to a state agency to amount to act under color of state law seems a clear error.

[37] 122 S.Ct. 2268 (2002).

The accused student sued Gonzaga in state court on several tort and contract theories, as well as a FERPA- based Section 1983 claim. A jury found for the student, and awarded $1,155,000 in damages, which included $150,000 compensatory and $300,000 punitive damages for the FERPA violation, as well as attorney's fees.[38] The case was appealed through the state court system, then a certiorari petition was filed with the U.S. Supreme Court.

C. The majority opinion

In an opinion authored by Chief Justice Rehnquist, a majority of the Court held that FERPA created no rights enforceable under Section 1983. Five Justices joined the opinion, while two concurred in the judgment (and wrote a separate opinion) and two others dissented.

In Section 1983 Congress provided a tort remedy for persons whose "rights, privileges or immunities secured by the Constitution *and laws*" (emphasis added) are violated by government actors. In prior cases, the Court had articulated and repeatedly applied a two part test to determine whether a particular federal statute was one of the "laws" Congress has made actionable under Section 1983. First, the Court examined whether the statute in question created benefits which were determinate enough to be enforceable. If the rights were instead vague and ambiguous, the statute would not be actionable under Section 1983. Second, the Court examined whether Congress had created a comprehensive remedy which would foreclose enforcement under Section 1983.[39] In the majority opinion in *Gonzaga*, the Court purported to affirm this analysis, but announced several new principles. First, the Court announced a sort of unofficial presumption against Spending Clause legislation creating Section 1983-enforceable rights; the Court noted that the normal remedy for violations of Spending Clause legislation was termination of funding rather than private lawsuits. Second, the Court announced that the analysis used to decide if a statute created a private cause of action relevant to determining if the same statute was enforceable under Section 1983. Finally, the Court distinguished Section 1983-enforceable statutes such as Title VI and Title IX which are couched in the language of personal interests with statutes such as FERPA which it found to be couched in systemic language rather than "unambiguously conferring individual rights." Applying these new principles, the Court noted that FERPA was Spending Clause legislation never found by any court to create a private right of action or specifically intended by Congress to be enforceable under Section 1983, and was couched in systemic language, threatening termination of federal funding to schools which has a "policy or practice" prohibited by FERPA. The majority thus held that FERPA did not create sufficiently definite individual rights to be enforceable under Section 1983.

---

[38] *See Doe v. Gonzaga Univ.*, 24 P.3d 390 (Wash. 2001).

[39] *See, e.g., Blessing v. Freestone*, 520 U.S. 329 (1997); *Suter v. Artist M.*, 503 U.S. 347 (1992). The Court did not reach the second prong of this analysis in *Gonzaga*. 122 S.Ct. at 2279 n.8.

D. The dissent

The two dissenters attacked both the majority's announced doctrine and its application to FERPA.[40] The dissenting opinion noted that in its most recent case on point the Court found the first prong of the test for finding presumptive Section 1983-actionable "rights" to be satisfied when the statute was directed at a particular class, used mandatory language, and did not create rights which were in fact vague and ambiguous.[41] Applying this standard, the dissent found FERPA's language was mandatory, in fact actually used the word "rights" numerous times,[42] was aimed at a specific class of students and parents, and created rights such as access to one's own records which were less ambiguous than ones found by the Court to be actionable under Section 1983 in other cases. As to the majority's emphasis on FERPA's use of systemic language, the dissent noted that a systemic problem might be a requirement for individual relief, but still created individual rights. The dissent also criticized the majority's intermixing of private cause of action cases with Section 1983 enforcement doctrine. Turning to the second, "comprehensive remedy" prong of the analysis, the dissent reviewed the FPCO complaint and termination of federal funding remedies available under FERPA and found them to "fall far short" of being comprehensive remedies which would render unnecessary enforcement under Section 1983. Finally, the dissent noted that all federal appeals courts addressing the issue had found FERPA to be actionable under Section 1983.

E. Unanswered questions

Several questions arise from the *Gonzaga* decision.

First, under the Court's new approach to determining if federal statutes are actionable under Section 1983, are there other statutes regulating schools which can no longer form the basis for Section 1983 claims?

Second, after *Gonzaga* is there any meaningful way to enforce FERPA? The statute and regulations set out two enforcement mechanisms. First, the federal government can move to terminate all of an offending school's federal education funding. This is of course a drastic remedy, and one which has apparently never been invoked nor even initiated. Second, individuals who believe their FERPA rights have been violated can file a complaint with the Family Policy Compliance Office ("FPCO") in Washington D.C. The FPCO can investigate these complaints and seek voluntary compliance by the offending school. There is no hearing, no timelines for processing complaints, and no compensation or other recourse for the student.

A recent case, *U.S. v. Miami University ("Miami")*[43] points out a third enforcement possibility -- the FPCO may ask the Department of Justice to enforce FERPA. In *Miami*, the federal government sought injunctive relief against a private university for alleged FERPA violations. The Sixth Circuit held that the *Gonzaga* decision did not affect the availability of federal enforcement. *Miami* is apparently the only occasion where the federal government has sued to enforce FERPA.

---

[40] 122 S.Ct. at 2280 (Stevens, J., joined by Ginsburg., J., dissenting).

[41] *Blessing v. Freestone,* 520 U.S. at 340-341.

[42] A review of the statute shows the words "right" or "rights" to be used 11 times in FERPA, including of course the title.

[43] 294 F.3d 797 (6th Cir. 2002).

State law claims are also available, although a close examination of the *Gonzaga* case shows their availability is more theoretical than real. Some states have statutes governing student records which may be privately enforced.[44] The student plaintiff in *Gonzaga* brought five state law claims (defamation, negligence, breach of educational contract and invasion of privacy) as well as a FERPA/Section 1983 claim. The *Gonzaga* plaintiff's $1.155 million verdict, which at first glance suggests the availability of substantial damages for FERPA violations, in fact demonstrates that removing Section 1983 claims as a remedy for FERPA violations leaves injured students with no meaningful remedy. The bulk of the *Gonzaga* jury's damages award ($950,000 of $1,155,000 as well as the attorney's fees award) came from the defamation ($500,000) and FERPA/Section 1983 ($450,000 plus attorney's fees) claims. After the *Gonzaga* decision, FERPA/Section 1983 claims are no longer available. Defamation claims can only be successful when the plaintiff proves the statements made about her are false. Most unauthorized disclosures under FERPA involve accurate information (for example, unauthorized sharing of a student's grades or IQ test scores), thus defamation claims will normally be unavailable for FERPA violations involving disclosure.[45] In short, absent unusual circumstances defamation is not a viable claim when FERPA is violated.

The other three claims appeared not to be directly about the alleged FERPA violation. The negligence claim in *Gonzaga* was not really directly a FERPA claim, but instead alleged a breach by the school of its duty to perform a reasonable investigation of the rape allegations.[46] Similarly, the breach of educational contract claim related to school handbook language providing students accused of misconduct with a chance to be heard, rather than a FERPA violation.[47] Finally, the invasion of privacy claim related not to the FERPA violation but to the investigation preceding it. Specifically, the Washington Supreme Court held that the school's investigation, pursuant to the rape allegation, of the plaintiff's "personal relationships, habits, and even anatomy. . . the intimate details of a [teacher certification] candidate's sex life" to make out the "highly offensive" intrusion into the plaintiff's private affairs required to succeed with this claim.[48]

---

[44] Washington does not have such a statute, so it was not an issue in the *Gonzaga* case.

[45] FERPA can also be violated by failing to give parents/adult student access to their own records, by not offering requesting parents/adult students an internal hearing to challenge the accuracy of their own records, or by not providing parents/adult student with an annual notification of their FERPA rights. In these scenarios, too, defamation claims would not succeed.

[46] This claim resulted in a jury award of $50,000 in damages. The Washington Supreme Court reversed the jury award on negligence, holding that the school had no duty to investigate and therefore that no breach occurred.

[47] This claim resulted in a jury award of $55,000.

In sum, the *Gonzaga* plaintiff ultimately received no money damages as direct compensation for his FERPA rights being violated. As has been discussed elsewhere, the *Gonzaga* situation is not atypical; normally the only meaningful available remedy for FERPA violations has been Section 1983 claims, and that recourse is no longer available.

The *Gonzaga* decision is obviously a disheartening result for prospective FERPA and Section 1983 plaintiffs. As the dissent in *Gonzaga* notes, the FPCO complaint and termination of federal funding remedies, which are under normal circumstances the only recourse for FERPA violations "provide[] no guaranteed access to a formal administrative proceeding or to federal judicial review; rather it leaves to [FPCO] discretion whether to [even] follow up on individual complaints."[49] Discipline of school employees who violate FERPA is also an option. The nagging question, though, is whether FERPA continues to have enough enforcement "teeth" to ensure continued compliance?

---

[48] The plaintiff in *Gonzaga* was awarded $100,000 for invasion of privacy, which was upheld by the Washington Supreme Court

[49] 122 S.Ct. At 2283 (Stevens, J., dissenting).

FERPA: WHAT EXACTLY IS AN EDUCATIONAL RECORD?

Sara L. Doyle
Holland & Knight LLP
Suite 2000 One Atlantic Center
1201 West Peachtree Street, NE
Atlanta, Georgia 30309-3400

In light of the recent Supreme Court case, *Gonzaga University v. Doe*[1], school and college administrators have been breathing a sigh of relief. However, while there is no longer any real threat of individuals bringing suits against institutions for FERPA violations, the long-term impact of *Gonzaga* is yet to be seen. Colleges and schools should continue to comply with the Family Educational Rights & Privacy Act ("FERPA") as always because FERPA still requires compliance or the risk of loss of federal funding.

This paper will give a brief overview of FERPA followed by a discussion of what is an educational record centering on the recent Supreme Court case *Owasso Independent School District v. Falvo*, 122 S. Ct. 934 (2002).

I. WHAT IS FERPA

FERPA was enacted in 1974 to ensure (1) that parents of students, or students over the age of eighteen or attending an institution of post-secondary education, had access to their education records, and (2) to protect the student's right to privacy by limiting the transferability and disclosure of educational records without consent. FERPA is also known as the Buckley Amendment or the Buckley-Pell Amendment to the General Education Provisions Act. FERPA conditions the receipt of federal funding by educational institutions, on the institution's compliance with certain procedures. In order to gain FERPA protection, a document must be considered an "educational record."

FERPA is found at 20 U.S.C.A. § 1232g.

In pertinent part, FERPA states:

No funds shall be made available under any applicable program to any educational agency or institution which has a policy of denying, or which

---

[1] See materials prepared by co-presenter Ann Daggett for a full discussion on this case that held FERPA did not provide for a private right of action.

> effectively prevents, the parents of students who are or have been in attendance at a school, at such agency or at such institution, as the case may be, the right to inspect and review the education records of their children. . . .
>
> No funds shall be made available under any applicable program to any educational agency or institution unless the parents of students who are or have been in attendance at a school of such agency or at such institution are provided an opportunity for a hearing by such agency or institution, in accordance with regulations of the Secretary, to challenge the content of such student's education records, in order to ensure that the records are not inaccurate, misleading, or otherwise in violation of the privacy or other rights of students, and to provide an opportunity for the correction or deletion of any such inaccurate, misleading, or otherwise inappropriate data contained therein and to insert into such records a written explanation of the parents respecting the content of such records.

20 U.S.C.A. § 1232g(a)(1)(A), (2).

FERPA also requires that an educational institution comply with certain procedures when disclosing or releasing a student's educational records. FERPA states:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of permitting the release of educational records (or personally identifiable information contained therein other than directory information . . .) of students without the written consent of their parents to any individual, agency, or organization.

20 U.S.C.A. § 1232g(b)(1).

There are exceptions to this general rule and those include, among others, the right of the educational institution to release education records to other school officials who have been determined by the institution to have a legitimate educational interest in the records, state and local officials or authorities to whom such information is specifically required to be reported or disclosed pursuant to state statute, accrediting organizations, and subject to regulations of the Secretary, and in connection with an emergency, appropriate persons when the knowledge is necessary to protect the health or safety of the student or other persons.

20 U.S.C.A. § 1232g(b)(1)(A)-(I).

Finally, FERPA states that:

> No funds shall be made available under any applicable program to any educational agency or institution which has a policy or practice of releasing, or providing access to, any personally identifiable information in education records other than directory information, . . . unless --
>
> (A) there is written consent from the student's parents specifying records to be released, the reasons for such release, and to whom, with a copy of the records to be released to the student's parents and the student if desired by the parents, or
> (B) such information is furnished in compliance with judicial order, or pursuant to any lawfully issued subpoena, upon condition that parents and the students are notified of all such orders or subpoenas in advance of the compliance therewith by the educational institution.

20 U.S.C.A. § 1232g(b)(2). In short, federal funds will be denied to an institution if it denies parents or students the right to inspect and review the educational records of their children, if the institution denies the parents or students an opportunity to challenge the information in the records, where the educational institution has a policy or practice of permitting the release of educational records without the written consent of the parents or the institution has a policy or practice of releasing or providing access to personally identifiable information in education records without written consent or without giving notice to the parents and students prior to complying with a judicial order or a lawfully issued subpoena.

FERPA was designed to protect an individual's privacy interest in information relating to his or her education. FERPA accomplishes this by limiting the transferability of education records without consent. If an institution feels it cannot comply it has a duty to notify the Department of Education. 34 CFR § 99.61.

II. WHAT IS AN EDUCATIONAL RECORD?

To come within the purview of FERPA, a document must be an "education record." FERPA defines an education record broadly to include those records, files, documents, and other materials, which contain information directly related to a student and are maintained by an educational agency or institution or by a person acting for such agency or institution. 20 U.S.C.A. § 1232g.(a)(3)(A). The term "education record" does not include the following:

1. Records of instructional, supervisory and administrative personnel which are in the sole possession of the maker thereof and are not accessible or revealed to any other person except a substitute;
2. If law enforcement personnel do not have access to education records, the records and documents created by such law enforcement unit and are maintained solely for law enforcement purposes and are not made available to persons other than law enforcement officials of the same jurisdiction;
3. Records made and maintained in the normal course of business by an employee of an educational agency or institution which relate exclusively to such person in that person's capacity as an employee and are not available for any other purpose; and
4. Records on a student who is eighteen years of age or older, or one attending an institution of post-secondary education, which are made or maintained by a physician or other recognized professional which are made, maintained or used only in connection with the provision of treatment to the student and are not available to anyone other than persons providing such treatments.

20 U.S.C.A. § 1232g(3)(B).

Also excluded from the definition of education record is "directory information," which includes the student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of athletic team members, dates of attendance, degrees and awards received, and the most recent previous educational agency or institution attended by the student. 20 U.S.C.A. § 1232g.(a)(5). If an institution makes directory information public, it is required to give notice to a student before doing so. 20 U.S.C.A. § 2132g.(a)(5)(B).

Numerous issues under FERPA have been litigated in the courts. One of these issues is what documents constitute educational records.

III. PEER GRADING AND FERPA

In 2001, we learned from *Osborne v. Board of Regents of the University of Wisconsin System*, 634 N.W.2d 563 (2001), that an education record includes those records that were maintained in a high school, university, or testing agency that were transferred to another university or educational institution for admission purposes. This definition broadened the scope of documents that constituted educational records because it included records of individuals who did not necessarily enroll at a university, but who made application thereto and had documents maintained by the person's high school or other educational institution transferred to the school at which the applicant was applying.

The import of this decision is that under the *Osborne* analysis, an educational institution faced with a records request would not only need to determine whether the record is requested of an individual who was or is enrolled at that institution, but also whether the records it maintains on an applicant who did not enroll were created and maintained by another educational institution or agency when the applicant was a student at that other educational institution or agency.

The issue of when a document is "maintained" was recently addressed in 2002 by the Supreme Court in *Owasso, infra.* In *Owasso*, the court held that peer grading did not violate FERPA. In the Owasso Independent School District, like many other school districts around the country, teachers employed a technique for grading assignments that required students to exchange papers and grade another classmate's assignment. Thus, at that point, at least one other student had access to educational information about a classmate. Ms. Falvo brought suit against the Owasso Independent School District claiming that this practice violated FERPA because the assignments passed among the classmates constituted educational records under FERPA and the disclosure of the grade without consent constituted a violation.

The Supreme Court noted that the assignments did contain information directly related to a student, but held that the assignments were not educational records under FERPA until they were maintained by the educational agency or institution. Because the papers, when being graded by classmates, were not "maintained" by the educational institution, the assignments did not constitute educational records. In relying on this decision, the court looked to the ordinary meaning of the word maintained which is to "keep in existence or continuance; preserve; retain." *Owasso*, 122 S. Ct. at 938, *citing* RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, 1160 (2nd Ed. 1987). The court did not decide, but rather assumed, that a teacher's grade book is an education record. Thus, it was not until the score on a student's graded assignment was contained therein that the grade became an education record.

The Supreme Court further noted that a student grader is not a person acting for an educational institution such that he or she could be considered to maintain the education record during the grading process. According to the Supreme Court, FERPA implies that education records are institutional records kept by a single central custodian such as a registrar, not individual assignments handled by many student graders in their separate classrooms. *Owasso*, 122 S. Ct. at 940.

Based on the Supreme Court' holding in *Owasso*, teachers may employ peer grading in their classrooms without worrying that they are violating FERPA. The *Owasso* holding limits the definition of educational record in that it does not include assignments being handled by classmates. The court did not decide whether, once the assignment was turned in to the teacher and was maintained by the teacher for the educational institution, the assignment became an educational record under the Act.

IV. DISCIPLINARY RECORDS AND FERPA

Subsequent to the Supreme Court decision in *Owasso*, the Sixth Circuit also issued a well-written decision regarding disciplinary records under FERPA and the interplay of a state open records act and the First Amendment when dealing with a request for disciplinary records. In *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002), the Chronicle of Higher Education intervened to contest the District Court's grant of a permanent injunction prohibiting the university from producing disciplinary records. The Court concluded that disciplinary records were educational records under FERPA and that releasing such information would constitute a violation. This case stemmed from an earlier dispute between the University newspaper and administration. The Miami newspaper sought student disciplinary records from the University to track crime trends. Initially, the University refused to release the information but then the editors made a written records request pursuant to the Ohio Public Records Act. As a result, the University released the records. However, pursuant to FERPA's privacy provisions, the University redacted the identity, sex, and age of the accused as well as the date, time and locations of the incidents giving rise to the disciplinary charges. In a subsequent lawsuit brought by the newspaper, the Ohio Supreme Court determined that the disciplinary records were not protected by FERPA and ordered the University to produce all the records requested by the editors - namely, the documents previously produced with redacting only the name, social security number or student I.D. of the accused or convicted party.

Subsequent to this decision, the Chronicle, pursuant to the Ohio Public Records Act, made written request to Miami University and Ohio State University for disciplinary records during 1995 and 1996. The Chronicle requested that the records be produced with names intact and minimal redaction. Upon receipt of this request, Miami University contacted the United States Department of Education ("DOE") and explained that it might not be able to comply with FERPA. The DOE's position was that the Ohio Supreme Court's ruling was incorrect and that disclosure of the student disciplinary records would be a violation of FERPA. Subsequent to these discussions the DOE filed suit against Miami University and Ohio State University seeking to prohibit them from disclosing the student disciplinary records containing personally identifiable information. The District Court granted the DOE's motion and permanently enjoined the universities from releasing student disciplinary records in violation of FERPA. It was at this point that the Chronicle intervened and appealed the decision. In ruling on the appeal, the Sixth Circuit analyzed the interplay between the Ohio Public Records Act which specifically recognized an exemption from its definition of public records for those the release of which is prohibited by federal law. This exception, the Sixth Circuit noted, clearly included FERPA's prohibition against disclosure of certain records. The Sixth Circuit then went on to determine that pursuant to FERPA's broad definition of education records, student disciplinary records were education records because they directly related to the student and were kept by the student's university.

The Chronicle argued that student disciplinary records involved criminal offenses that should be construed as unprotected law enforcement records. The Sixth Circuit disagreed with this argument, holding that disciplinary records were educational records under FERPA subject only to five exceptions to the Act which allow disclosure of disciplinary records to the alleged victim of the crime or those who have a legitimate educational interest in the student, when the student poses a significant risk of safety or well-being to himself or others. Other exceptions include disclosing the final results of disciplinary proceedings in certain instances or disclosing to the student's parent or legal guardian when the student has committed a disciplinary violation with respect to the use or possession of alcohol or a controlled substance. Finally, the court noted that records maintained by law enforcement units created by that law enforcement unit for the purpose of law enforcement were also excluded from the definition of education records. However, the court found that the universities' disciplinary boards did not constitute law enforcement units and further stated that the disciplinary action or proceeding conducted by the educational institution and the records created therein were not those of a law enforcement unit.

Finally, the Chronicle argued that the prohibition violated their First Amendment rights. The Court determined that the rights of the students to privacy outweighed the First Amendment right asserted by the Chronicle because the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally. The court determined that university disciplinary records were not made available on a regular basis and, thus, the First Amendment argument failed. Finally, the court noted that the Chronicle could still request student disciplinary records that did not contain personally identifiable information. Under such circumstances, the universities could provide the information to the Chronicle if this information was redacted.

III. CONCLUSION

Education records are broadly defined under FERPA. Unless an education record falls within the specific parameters of an exception identified in the Act, then it is in the educational institution's best interest to decline to produce the requested information and to keep it private.

The Court: A tool for school improvement?

Jason P. Klein
Community Consolidated School District 21–Wheeling, Illinois

The Court: A tool for school improvement?

During its 2001-2002 term, the United States Supreme Court heard arguments in and decided a case entitled Owasso Independent School District Number I-011 v. Falvo. The question in this case centers around whether it is an acceptable practice for teachers to allow students to grade one another's work in the classroom or whether such practice violates the 1974 Family Educational Rights and Privacy Act, a law which provides for the confidentiality of student records. As the term evolved, school administrators looked to the decision with anticipation for, depending upon the Court's perspective, the case might provide school administrators with a new tool by which they could encourage reluctant teachers to abandon certain methods of student assessment and replace those with ones that may provide more useful and powerful feedback regarding what students know and are able to do. In this sense, the Owasso case held the potential to become another tool for administrators to use in order to pursue the ongoing quest of improving schools for the benefit of ever-greater numbers of students. While school leaders focus on using positive tools to create an environment for ongoing change, such as shared decision-making structures and data-driven reflection, the power of a Supreme Court decision might serve as another influential tool that can cause changes to improve classroom practices. In order to understand the potential importance of this case on classrooms and schools, one must understand the importance of assessment in schools today.

Over the past decade, educators at all levels have begun to understand that assessment ought to mean a great deal more than simply giving grades to students. Rather, "assessment should be designed to provide ongoing, useful feedback, to both students and teachers, on what students have learned" (Jackson & Davis, 2000, p. 54). Whether assessments achieve the aforementioned goal of providing "useful feedback…on what students have learned" is probably doubtful. Most student assessments are local assessments, given at the classroom, school, or district level. During this era of standards-based reform, students and teachers have also become familiar with state assessments. These are generally standardized tests aligned with the learning standards of a particular state (Odden & Picus, 2000). Then, there are national assessments, such as the National Assessment of Educational Progress (NAEP), and international assessments, like the Third International Math and Science Study (TIMSS). Regardless of the level at which the assessment is given, who designed it, or how it is administered, student assessments measure the knowledge or ability of students to know and explain broad conceptual and specific content knowledge, to demonstrate competence in the completion of specific skills such as those needed for writing and mathematics, and/or to evaluate student performance in the affective domains that are necessary for success in school and the workplace. For educators, particularly school principals and classroom teachers, a worthwhile assessment of any element of schooling, created by any level of governance, provides information as to what a student knows and is able to do.

The recent emphasis on student assessment is a direct result of the policy era in which American public education currently exists, the era of standards-based reform. Standards-based reform has its roots with the 1983 publication of A Nation at Risk, the U.S. Department of Education report that decried the state of learning in American schools and that suggested that U.S. schools were leading to national disaster. In response to this report, educators, government officials, and business leaders sought new methods of ensuring high quality public education. With the beginning of the 1990's, these efforts had coalesced into the standards movement, whereby state governments issue a set of content and skill standards that outline what students are expected to know and be able to do as a result of their schooling. Along with the creation of the standards, policymakers have also determined that it is necessary to evaluate student and school performance on the standards and provide accountability measures to ensure that all schools meet these standards. This movement has thrust student assessment into the spotlight of curriculum and instruction topics. Thus, backwards design has emerged as the umbrella best practice under which other new ideas about assessment must fit (Wiggins & McTighe, 1998).

Backwards design refers to a planning process that teachers use to prepare for instructional units. The process begins by identifying what students ought to know and be able to do at the end of the instructional unit. These objectives should be based on standards, including both the standards of the state in which the school resides and standards that have been drafted by professional organizations. In other words, the standards documents ought to be used during the planning process itself. Once the standards that will be covered in a unit have been identified, the next step is to determine the best way to measure whether students have attained the standard. A high quality assessment plan for an upcoming unit will include both formative assessments, or how the teacher will assess students during the unit in order to check their progress, and summative assessments, which fall at the end of the unit of study and determine whether or not a student has mastered the standard. Of course, even these summative assessments are also formative and diagnostic in the hands of teachers whose classrooms reflect the range of instructional best practices. Now, with the standards clearly identified and the assessments designed, a teacher would begin to devote time and energy to creating and implementing instructional activities that help students understand, be able to do, and apply what is being covered during the unit. A classroom that is highly effective for all learners will be most effective when it applies the systematic process of backwards design. Of course, a comprehensive planning process does not alone make a successful classroom, but without such planning, it is impossible to create a classroom that truly exhibits a balanced approach to instruction and assessment that engages all types of students in their learning and that allows them to demonstrate their knowledge and skills in diverse settings.

Today, it is generally accepted in the educational community that students learn in a variety of ways (Gardner, 1991; Bruner, 1996; Caine & Caine, 1997; Eisner, 1998). While teachers have become more and more adept at providing instructional activities that allow students to acquire new knowledge in the manner which best suits each child's learning style, it remains common to simply assess students' acquisition of this knowledge with a traditional pencil and paper test, like a multiple choice test. A balanced approach to assessment, and one that complements the backwards design framework, requires teachers to ask themselves what is the most valid and meaningful way to determine whether or not each student has mastered each standard (Stiggins, 1997). This question ought to be asked for each standard in turn. If students are expected to recall basic facts, a pencil and paper assessment with multiple choice and short answer questions may be appropriate. If students have been taught a new skill, they ought to be asked to demonstrate their ability to perform that skill. Their performance can then be assessed with a rubric, which describes what type of performance meets the standard, what type of performance does not meet the standard, and what type of performance exceeds the standard. If one is teaching students to learn a process, such as the steps of the scientific method or how students work as members of the group, teachers might complete a checklist for each student or ask the students to assess their own performance related to the standard. A classroom in which assessment is balanced will use a variety of tools, ranging from those that require reading and writing to those that require listening, speaking, drawing, moving, and doing. Regardless of grade level or content, best practices in classroom assessment dictate that assessments are matched to the standard that is to be measured.

The vast majority of student assessment takes place at the classroom level, and to that end, it is imperative that teachers view grading as simply the collection of evidence represented by the various assessments that have been completed (O'Connor, 2001). In other words, in classrooms that rely upon best practices in student assessment, teachers must collect evidence to support a grade throughout a term rather than simply enter and average numbers in a grade book. The use of portfolios can provide an organizational tool for such a collection of evidence (Davies, 2000). Additionally, student portfolios serve as the foundation for a classroom in which students regularly self-assess. Self-assessment is critically important if students are to become lifelong learners because through self-assessment students "can realistically and constructively judge the merits and shortcomings of their own efforts and productions" (Preece, 1995, p. 30). When students take responsibility for the assessment of their own work, they also take responsibility for their learning. This is a powerful step towards becoming a lifelong learner.

High quality student assessment incorporates a diverse and comprehensive mix of activities that provide teachers, students, parents, and other stakeholders important data about student performance. These activities include state and national assessments, traditional classroom assessments like essays and multiple choice tests, as well as student self-assessments, peer assessments, checklists, interviews, and performance-based assessments. As with any major transformation of traditional notions of teaching and learning, educational leaders face the challenge of providing an environment in which teachers can learn, understand, believe in, and implement a more comprehensive paradigm of student assessment. Creative educational leaders look for strategies that they might use as they differentiate their leadership style based on the needs of individual teachers. The United States Supreme Court's decision in Owasso Independent School District No. I-011 v. Falvo, held the potential to become another tool for school leaders to use in helping teachers shift from the use of traditional assessments to a more comprehensive approach to assessment.

The Owasso Case

In 1974, Congress passed the Family Educational Rights and Privacy Act, more commonly known as FERPA. FERPA provides for the confidentiality of student records in schools receiving federal funding, including student grades. In this case, a parent, Kristja Falvo called into question the practice of allowing students to grade one another's work. All three of her children had experienced this in classrooms in the Owasso Independent School District No. I-011, and Falvo argued that this practice was embarrassing to her children. Falvo asked the school district to disallow the practice, but her request was denied. The case, then, began its journey through the judicial system, where it would eventually wind up in the U.S. Supreme Court. At question for the Court in this case "is whether peer-graded classroom work and assignments are education records" (Owasso ISD No. I-011 v. Falvo, 2002, p. 2). The question at issue in the case hinges on whether the peer-graded work is "maintained" by the school or teacher (Owasso ISD No. I-011 v. Falvo, 2002, p. 4). On this point, the Owasso School District argued that actual student work did not qualify as an education record, though "final course grades, student grade point averages, standardized test scores, attendance records, counseling records, and records of disciplinary actions" all ought to be considered education records (Owasso ISD No. I-011 v. Falvo, 2002, p. 5). The Court of Appeals, which had found in favor of Falvo, viewed educational records differently. The Court of Appeals determined that teacher grade books are educational records, and while grades are not "maintained" until they are recorded in the grade book, the Court of Appeals "reasoned…that if Congress forbids teachers to disclose students' grades once written in a grade book, it makes no sense to permit the disclosure immediately beforehand" (Owasso ISD No. I-011 v. Falvo, 2002, p. 5). The Supreme Court disagreed with this logic.

Rather than choose to further define FERPA, the Supreme Court chose to continue a tradition of the federal courts that treads very carefully when making decisions that may impact public schools as it relates to teaching and learning in the classroom. Though this point will be discussed in greater detail later in this paper, the Court writes that "we would hesitate before interpreting the statute to effect such a substantial change in the balance of federalism unless that is the manifest purpose of the legislation" (Owasso ISD No. I-011 v. Falvo, 2002, p. 6). Using this as its guiding principle, the Court further states,

> "Correcting a classmate's work can be as much a part of the assignment as taking the test itself. It is a way to teach material again in a new context, and it helps show students how to assist and respect fellow pupils. By explaining the answers to the class as the students correct the papers, the teacher not only reinforces the lesson but also discovers whether the students have understood material and are ready to move on. We do not think FERPA prohibits these educational techniques" Emphasis added (Owasso ISD No. I-011 v. Falvo, 2002, p. 7).

While it may appear that the Court is taking a very active role in discussing teaching and learning on the surface, the truth is quite different. Rather than supporting any particular instructional strategies, the Court is simply declaring that these activities are not in violation of FERPA. The Court, as it has acknowledged often in the past, does not claim pedagogical expertise and, as a result, would rather leave decisions regarding classroom instruction and assessment to teachers and administrators. In the end, the Court determined that peer-graded student work is not an educational record until it has been recorded in the teacher's grade book.

The "Alternative" Decision

Legal research must be conducted based on the decision of the court and the wording of the justices. As such, to ask the question of "what if" is often considered futile, irrational, or even dangerous. Nevertheless, given the ever-shifting and highly political nature of education policymaking during the past two decades, a brief consideration of how the "alternative" decision may have impacted schools might enlighten future policy decisions. Had the Court decided that peer-grading violated the intentions of FERPA, school administrators would have been given a powerful tool to use with teachers who employ their students for the scoring of student work. For example, a school principal would have been able to simply tell a teacher that was regularly having students exchange quizzes and tests for grading that this practice was against the law and must be discontinued. This could serve as a first step towards improving teaching and learning in the classrooms of these teachers, for peer-grading can only be used with simple recall, pencil and paper assessments. With this type of assessments, teachers can simply read the one correct answer to the students, who, in turn, score the paper. The same cannot be said of more complex, high-level, open-ended assessments. Without a single correct answer for the teacher to call out, it becomes necessary for the teacher to score the work. Of course, there is no silver bullet to school change. Had the Court prevented the continued use of peer-grading, teachers may not have replaced this practice with a dramatic shift to the use of performance-based assessments, self-assessments, and portfolios, in which the evidence of a student's performance can be collected over time.

While there may be a great pedagogical difference between peer-grading and peer assessment, the "alternative" decision would have likely negated both as viable classroom strategies. Whereas peer grading involves having students score one another's work, peer assessment involves having students actually evaluate one another as part of a constructive process that is designed to teach students on both ends of the exchange. This type of activity not only helps students better learn content and skills as defined by standards, but it also enables students to learn and practice some of the real world collaboration skills that are necessary for success in the 21st Century workplace as well as to fulfill one's responsibilities as a participant in American society (SCANS, 1991; Klein, 1999). For example, an eighth grade class is completing a health and biology unit, and students have been assigned an individual project in which they have chosen what they believe is the greatest health risk to teenagers. Students have been required to research this health risk and develop a set of responses to it as well as prevention solutions. Students are then required to prepare a presentation in which they will share the information that they have researched regarding this health risk and their responses and solutions. Through this project, students are expected to meet certain health and science standards as well as a number of language arts standards. A peer assessment in this situation might involve requiring students to use the teacher-designed rubric to score one of their classmate's presentations and conference with that classmate following the presentation to share the perceived strengths and weaknesses of the presentation. In this setting, both students, the presenter and the evaluator, would benefit from a more detailed understanding of what a good presentation encompasses as well as what type of strategies one can use in the future to ensure that they are as well prepared as possible for a good presentation. This type of peer assessment is far different than having students peer-grade by checking whether a word is spelled correctly or incorrectly on a spelling test. Had the Court found that peer-grading violated FERPA's provisions, then peer assessment would have been a likely casualty of this decision as well.

The Implications of the Decision

As with any decision of the United States Supreme Court, the Owasso decision is fraught with long-term implications for public education, some of which will probably remain unforeseen for the near future. Among those that can be seen and directly impact teaching and learning at the classroom level is the fact that peer-grading can legally continue as it is not in violation of FERPA. While peer-grading may not provide as rich an educational experience as that to which the Court has alluded, this decision also implies that peer assessment, an important component of a comprehensive assessment plan, can continue to be implemented and refined in more and more classrooms as an instructional strategy that empowers students. There need not be fear on the part of teachers or administrators that high-level peer assessments will violate FERPA.

More important than this direct and explicit implication of the Owasso decision is that the Court has, again, demonstrated its reluctance to become intricately involved in issues of teaching and learning. Rather, the Court has made a classroom-related decision at arm's length from the role of the teacher and the administrator so as not to infringe upon the space necessary for individuals in those positions to successfully accomplish their jobs. This line of thought is exemplified in the Sixth Circuit Court of Appeals' opinion in Settle v. Dickson County School Board, et al. "Federal courts should exercise particular restraint in classroom conflicts between student and teacher over matters falling within the ordinary authority of the teacher over curriculum and course content" (1995, p. 155). Not only did the majority opinion in this case support the notion that teachers and administrators must be given broad discretion by the courts to carry out their duties so long as there is no infringement of student rights, but the concurring opinion also supported this concept.

> "Implicit in the majority's opinion is the view that classroom teachers can make mistakes of judgment in determining how to teach, and these mistakes, so long as they are not based on impermissible criteria, do not give rise to claims of constitutional deprivations. I wholly agree. And on the facts of this case, that is all that needs to be said" (Settle v. Dickson County School Board, et al., 1995, p. 157).

In other words, "The bottom line is that when a teacher makes an assignment, even if she does it poorly, the student has no constitutional right to do something other than the assignment and receive credit for it" (Settle v. Dickson County School Board, et al., 1995, p. 158). Not only has the Sixth Circuit Court of Appeals supported the spectrum of decision-making powers enjoyed by public school teachers and administrators, but the United States Supreme Court has done so in a number of instances as well.

In the landmark Hazelwood case, the Court supported the decision of a high school principal to eliminate two pages of an edition of the school newspaper prior to its publication. The newspaper was produced as part of the school's journalism courses. In so doing, the Court stated, "This standard is consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, not of federal judges" (Hazelwood School District v. Kuhlmeier, 1988, p. 273). Following this same pattern, thirteen years earlier, the Court stated, "It is not the rule of the federal courts to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion" (Wood v. Strickland, 1975, p. 326). The courts have clearly defined their own role in public education. They will decide broad, sweeping issues, but they will not manage educational affairs. "Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values" (Epperson v. Arkansas, 1968, p. 104). Peer-grading, and assessment of student performance more generally, provide concrete examples of a topic central to the daily operation of a school to which the Court speaks in Epperson. While student assessment is very important in educational terms, it is not, as the Court has acknowledged by its decision in Owasso, a basic constitutional value.

The Real Tools for Improvement

Since 1983, and particularly throughout the 1990's, education has maintained its position atop the domestic political agenda of the American public and among American politicians. In spite of its importance, issues related to curriculum, instruction, and assessment, are not, generally, the territory of the judicial system. The American judiciary has a long history of avoiding the delicate internal workings of school classrooms, and while the executive and legislative branches of state and federal governments have the right and privilege of making policies which can impact teaching and learning, they may be wise to follow the judiciary's lead in avoiding such mandates. Why? Mandates have not been successful in significantly changing the underlying assumptions of teaching and learning in American public school classrooms (Sarason, 1990). This, then, begs the question: what meaningful impact can a president, Congress, a governor, or a state legislature have on school reform? The answer is that, unless these potentially powerful individuals begin to ask very different questions regarding public education and their role in it, they will probably continue to have very little impact. Substantial change is a long, arduous, and ongoing process that occurs at the local level and involves the range of critical stakeholders (Fullan, 1993). While the "alternative" decision in Owasso may have prevented teachers from having students grade one another's fill-in-the-blank and multiple choice tests, it would not, and it could not, have generated meaningful long-term changes that would engage more students and lead to higher levels of achievement.

What is the final result of the Owasso decision as it relates to student assessment over the long-term? The result is that this answer will come from each individual school. By finding that peer-grading does not violate FERPA, the Court has done nothing to upset the instructional status quo. At the same time, the Court has reiterated its long-standing support of the decisions of teachers and administrators on issues that are central to teaching and learning. As a result of this decision, some schools may continue choosing not to change, and they will not be forced to do so by the Court. For those schools that do seek change and improvement, it will occur under the leadership of the school principal, the individual who "merits the title of 'gatekeeper of change'" (Sarason, 1996, p. 77). This principal will need a complete set of tools in order to realize long-term and ongoing changes in the organization and practices of the school. Such changes will require the principal to truly create a learning organization, one in which all members of the organization are expected to continually seek out new ideas and reflect upon the results of their current practices in a highly collaborative setting (Senge, 1990). Leading a learning organization requires that the principal become the head learner of the organization. In other words, "teachers and students benefit when principals function as learning leaders rather than instructional leaders" (DuFour, 2002, p. 13). Once the principal is willing to risk being a learner rather than a knower, he or she can continuing working towards the goal of creating a school that will continually improve itself through its very structures and culture. If the principal hopes to diminish a reliance on peer grading in order to change and improve student assessment in the school, there is no legal imperative from which to base this change. Rather, the most lasting change will be the result of new learning among staff members who, then, realize the benefits of other practices. The literature suggests that effective schools are likely to change when the principal leads as a learner, but it is equally as important that he or she lead through collaborative structures (Rosenholtz, 1989; Glickman, 1998). By including others, such as teachers, parents, and even students, all members of the community not only have opportunities for their voices to be heard, but all share in the responsibility of the school's successes and its failures. When given the opportunity to truly impact the decision-making process, the efficacy of members of the school community will increase and so, too, will their motivation to perform and achieve at the highest possible level. Meaningful and substantial change to student assessment practices, as well as all other basic components of teaching and learning, cannot come from a mandate of any branch of government. Rather, such change is the result of the effective use of these aforementioned tools of school leadership.

Since the onset of the Standards Movement, the understanding of what classroom assessment is and what it ought to be has grown dramatically. Owasso Independent School District No. I-011 v. Falvo presented a legal opportunity to accelerate the discussion of student assessment with many teachers and in many schools where student assessment continues to primarily consist of pencil and paper tests that feature questions requiring students to recall basic facts about a particular topic. While this type of assessment certainly has a place in a more comprehensive system of student assessment, such a system seeks to collect a variety of evidence that demonstrates the performance of a student over time on different tasks. With the Supreme Court's decision in Owasso, school leaders have not been given the opportunity to simply use the law as a blunt tool with which to accelerate change. Nevertheless, this decision is not without its benefits for school leaders. The Court has continued its pattern of demonstrating reluctance at making decisions related to the core technology of schools, teaching and learning. For schools and students, this means that the burden of shifting the focus of student assessment, along with all other aspects of public education, will continue to weigh on the shoulders of school administrators and teacher leaders. As the Court has demonstrated, these individuals are likely to have much greater fitness for carrying out this task than will nine justices seated in Washington, D.C. Nevertheless, school improvement is an exceedingly difficult task, and to be successful, it will require leaders who possess a unique and lucid vision as well as the skills and knowledge to realize this vision alongside other members in their school communities. In other words, the Supreme Court's decision did not prove to be a quick and easy tool for school improvement in the short-term, but the Court has continued to allow the real tools for school improvement to do their work, public school educators hammering away at school improvement in conjunction with students and parents.

The Court: A tool for school improvement?

References

Bruner, J. (1996). The culture of education. Cambridge, MA: Harvard University Press.

Caine, G., & Caine, R. N. (1997). Education on the edge of possibility. Alexandria, VA: Association for Supervision and Curriculum Development.

Davies, A. (2000). Making classroom assessment work. Merville, BC: Connections Publishing.

DuFour, R. (2002). The learning-centered principal. Educational Leadership, 59 (8), 12-15.

Eisner, E. W. (1998). The kind of schools we need: Personal essays. Portsmouth, NH: Heinemann.

Epperson v. Arkansas. (1968). 393 U.S. 97.

Fullan, M. (1993). Change forces: Probing the depths of educational reform. London: The Falmer Press.

Gardner, H. (1991). Unschooled mind: How children think and how schools should teach. New York: Basic Books.

Glickman, C. D. (1998). Revolutionizing America's schools. San Francisco: Josey-Bass.

Hazelwood School District v. Kuhlmeier. (1988). 484 U.S. 260.

Jackson, A. W., & Davis, G. A. (2000). Turning points 2000: Educating adolescents in the 21st Century. New York: Teachers College Press.

Klein, J. (1999). Good citizens: Educating middle school students to be participants in a democracy. Schools in the Middle, 9 (3), 22-27.

O'Connor, K. (2001). The principal's role in report card grading. NASSP Bulletin, 85 (621), 37-46.

Odden, A. R., & Picus, L. O. (2000). School finance: A policy perspective. Boston: McGraw-Hill.

Owasso Independent School District No. I-011 v. Falvo. (2002). 534 U.S. 426.

Preece, A. (1995). Self-evaluation: Making it matter. In A. L. Costa & B. Kallick (Eds.), Assessment in the learning organization: Shifting the paradigm (pp. 30-48). Alexandria, VA: Association for Supervision and Curriculum Development.

Rosenholtz, S. J. (1989). Teacher's workplace: The social organization of schools. New York: Teachers College Press.

Sarason, S. B. (1990). The predictable failure of educational reform. San Francisco: Josey-Bass.

Sarason, S. B. (1996). Revisiting "The culture of the school and the problem of change". New York: Teachers College Press.

Secretary's Commission on Achieving Necessary Skills (SCANS). (1991). [On-line], Available: http://www.reg10.doleta.gov/scans.htm.

Senge, P. M. (1990). The fifth discipline: The art & practice of the learning organization. New York: Currency Doubleday.

Settle v. Dickson County School Board, et al. (1995). 53 F.3d 152.

Stiggins, R. J. (1997). Student-centered classroom assessment. Upper Saddle River, NJ: Merrill.

Wiggins, G., & McTighe, J. (1998). Understanding by design. Alexandria, VA: Association for Supervision and Curriculum Development.

Wood v. Strickland. (1975). 420 U.S. 308.

Search and Seizure

By Kenneth T. Murray, J.D., Ph.D.

Public school students are under the control of the school authorities while at school, on their way to school, on their way home from school, at a school function off of the school premises, or while they otherwise are presumed by law to be at school.[i] In addition, the principal or the principal's designee may search a student's effects in a locker or other storage area upon reasonable suspicion that a prohibited or illegally possessed substance or object is contained therein. The term "reasonable suspicion" was defined by the United States Supreme Court in 1985 in a case involving the search of a female student's purse.[ii] When drug paraphernalia was discovered, the school authority proceeded to search the student's purse and found marijuana. When subsequent criminal charges for possession of a controlled substance were brought against the student, her attorney challenged the search as one without "probable cause" and therefore in violation of the Fourth Amendment prohibition of unreasonable search and seizure. The case made its way to the United States Supreme Court and the Court found the search to be legal saying that since the school authorities act *in loco parentis* of the students, the strict requirement of "probable cause", which is required of most police searches, will unduly hamper the school authorities in maintaining proper discipline within the schools. Therefore, said the Court, school authorities need only "reasonable suspicion" in order to conduct a legal search of a student. They then continued to define reasonable suspicion as the following. 1) The search must be reasonable at its inception. That is to say the school authorities must have reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. 2) The search must be reasonable in scope. The measures adopted must be reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.[iii]

All issues concerning lawful or unlawful search and seizure, whether in a public school setting or otherwise, are predicated upon the Fourth Amendment to the United States Constitution which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[iv]

Subsequent to that Amendment, all challenges concerning searches of property or persons must be analyzed within the parameters set forth therein.

From Black's Law Dictionary certain terms used within the Fourth Amendment or coined subsequent thereto have been defined. Definitions notwithstanding, however, these terms (and court interpretations of them) have been the source of substantial litigation.

1. **Search** "Search" consists of the looking for or seeking out that which is otherwise concealed from view. Visual observation which infringes upon a person's reasonable expectation of privacy constitutes a "search" in the Constitutional sense.

In *Doe v. Renfrow*, 631 F.2d 91 (1980), the Seventh Circuit Court of Appeals held that a non-intrusive "search" by drug-trained dogs was, in fact, not a **search** under the Fourth Amendment, but preliminary to a search . However, a Federal District Court, that same year held such a dog search to be unconstitutional as teams of drug sniffing dogs violated the students' privacy right based upon the threatening presence of the animals. *Jones v. Latexo Independent School District,* 499 F. Supp 223 (E.D. Texas 1980). Finally, in *Horton v. Goose Creek Independent School District*, 677 F.2d 471 (1982), the Fifth Circuit Court of Appeals found that drug-trained dogs which were closely sniffing students, violated the Fourth Amendment because it was an unwarranted invasion to the students' privacy rights. It did state, however, that it is permissible for such dogs to search students' automobiles and lockers. The rule for school personnel who are considering the use of drug-trained dogs is that such is probably permissible so long as the dogs are not allowed to get up close and personal with the students.

2. **Seizure**: "Seizure" is the taking possession of property. Such also occurs when an officer arrests an individual (ie. Seizing the person), or whenever he restrains the individual's freedom to walk away.

3. **Probable Cause:** "Probable Cause" has been defined as "reasonable cause;" (not to be confused with "reasonable suspicion" defined below) having more evidence for than against. A reasonable ground for belief in certain facts. A set of probabilities grounded in the factual and practical considerations which govern the decisions of reasonable and prudent persons and is more than mere suspicion but less than the quantum of evidence required for conviction.

4. **Reasonable Suspicion:** "Reasonable Suspicion" is such suspicion which will justify an officer, for Fourth Amendment purposes, in stopping a defendant in a public place. It is the quantum of knowledge sufficient to induce ordinary prudent and cautious men under like circumstances to believe criminal activity is at hand. It must be based upon specific and describable facts, which, taken together with rational inferences from those facts, reasonably warrants such intrusion.

5. **Exclusionary Rule**: The "Exclusionary Rule" was developed by the courts in order to vindicate a defendant's Fourth Amendment rights if such were abridged. The rule commands that where evidence has been obtained in violation of the Fourth Amendment protections stated above, that tainted evidence may not be used against the defendant at trial.

A recent Sarasota County case overturned an adjudication of delinquency for a student after she was found in possession of rock cocaine.[v] A female assistant principal searched a female student when it had been reported that the student might be carrying a knife in school for the purpose of participation in a fight. The assistant principal searched the girl's purse but found no knife. She then felt inside a small pocket on the side of the purse and felt a plastic bag. Upon inspection she discovered the bag to contain a few pieces of rock cocaine. The Court of Appeals for the Second District of Florida held the search to go beyond the scope necessary to find the knife. The assistant principal admitted that she felt no lumps or bulges in the purse but inspected the side pocket anyway. The Court said that "while school safety may readily justify a search for weapons, the student's interest in privacy should preclude a scavenger hunt after the basic search produced no weapons." The Court continued to explain their rather thin logic by saying that the drugs were not in plain sight nor found during the basic search for the weapon. The drugs were, in fact, found during an "extended search" in a side pocket where quite plainly no weapon could be located.

Note that the "school official exception" to the probable cause requirement for warrant less searches allows only school officials to search a student upon "reasonable suspicion." If the School Resource Officer is involved in the search or if the school official is acting at the behest of a law enforcement officer, then probable cause is needed in order for there to be subsequent criminal prosecution of the offending student (*A.J.M. v. State*). On a more reasonable note, the case *State of Florida v. Roger Dean Sizemore, Jr.,* involved a search of a student's automobile by a school dean while at least in the company of the School Resource Officer. In this case the dean of discipline and the SRO were returning to school together in the patrol car when they spotted two students sitting in a parked truck in the back school parking lot. As they approached the truck the dean observed the student sitting in the passenger side of the truck actively hiding something under the front seat. Because this area of the parking lot had been wrought with drug problems, weapons, trespassers and thefts, the dean asked the students to step out of the vehicle and then proceeded to search the truck. His search uncovered a marijuana smoking pipe and a cigarette pack with two packages of marijuana in it. Since the defendant owned the truck, he was charged with criminal possession of marijuana. The defendant challenged the search for lack of probable cause. He depended on the holding in *A. J. M. v. State* (discussed above) that because the SRO was present during the search, he "acquiesced" in the search and therefore, the search needed probable cause. However, the Court found the *A. J. M.* rule not to apply and found that the dean acted reasonably and responsibly.

The *T.L.O.* decision was based upon the premise that school officials act *in loco parentis* and, therefore, have a more "parent-like" authority over the students. A recent case upheld a search by a Florida school principal of an automobile on school property but owned and driven by a non-student. *(State of Florida v. Eric Roderick Griffin*). In this case a high school principal saw a car with which he was not familiar located in the faculty parking lot and because he had experienced problems with non-students appearing at dismissal time, he took steps to identify the owner of the car. In that effort, he asked the School Resource Officer to check the tag number. Without further communication with the officer, the principal removed a jacket from the unlocked car in his search for identification and in the jacket found a bag of cannabis. He then notified the officer. Shortly thereafter two men approached the car (one of whom was the defendant) and were taken to the school office by the SRO. At that time the principal further searched the car finding more drugs and drug paraphernalia. As a result of the search by the principal, the defendant was criminally charged. When the defendant challenged the search (and the fruits thereof) the Court found that the officer neither directed nor participated in the search of the vehicle (thus eliminating the need for probable cause). The principal was justified at the inception of the search as he merely was looking for identification and was acting out of concern for the safety and well-being of the students. Because the search was justified at it's inception and did not exceed it's scope, the Court held that the search was reasonable and lawful.

Florida law requires the school to post, in a place readily seen by the students, a notice that the students' lockers or other storage areas are subject to search upon reasonable suspicion.[vi] This statute was upheld in a Pinellas County case where such a locker search revealed stolen property which discovery led to a criminal charge of grand theft being filed against the student.[vii] As it happened the defendant in this case was already on probation which was revoked by the Court. The defendant attempted to challenge the above locker search statute but with no success. School personnel should note that the student search statute also specifically states that it shall not be interpreted to prohibit the use of metal detectors or specially trained animals in the course of a search which is otherwise proper.[viii]

Litigious Searches

Typically in a public school setting certain search scenarios spawn the most litigation. Among those scenarios are strip searches, urine tests for drugs and searches for weapons.

Strip Searches

When students are involved in strip searches by school personnel, the courts usually rule against the school personnel not because strip searches are, per se, illegal, but because they are usually found to be unreasonable in the circumstances. One such case occurred in New York when a school principal and the school's security coordinator searched a young male student which search did, in fact, turn up illegal drugs.[ix] In this case a teacher observed a student entering the restroom twice within an hour, spending only five to ten seconds in the restroom each time. This particular student had been under observation by school officials for about six months for possibly dealing drugs. During this same day, he had also been seen eating lunch with another student who had likewise been under suspicion. The teacher reported the information to the school's security coordinator who in turn reported the matter to the principal. The principal brought the boy to the office and in the presence of the boy's dean and the principal, the security coordinator searched the boy. That search revealed thirteen glassine envelopes located in the boy's wallet. The coordinator then required the boy to strip. A vial containing nine pills of illegal substance were found. When the search was challenged, the Court held that although the school officials had the right to maintain discipline and safety, the boy's privacy rights simply outweighed the interest of the school in keeping the school drug-free. The Court deemed the strip search unreasonable because the limited information available to the principal was insufficient cause for such an intrusive search.

Another New York case was decided in 1977 by a Federal District Court. In this case [x]some public school teachers strip searched an entire fifth grade class in search of a missing $3.00 reported by another student. For obvious reasons the Court held the search to be too intrusive and too broad for the trivial object of the search.

Finally from the Eleventh Circuit Court of Appeals comes a very recent case involving student strip searches and personal 42 U.S.C. §1983 liability (discussed in Chapter 10). In the case of *Jenkins v. Talladega City Board of Education*, two elementary female students were strip searched twice in pursuit of a missing $7.00[xi]. As the old saying goes "it is easier to show reasonableness if the search turns up the contraband." Unfortunately for the school and the school personnel in this case no contraband was found in either of the two strip searches. Two second-grade girls were accused by another second-grader of stealing $7.00 and hiding the money in a backpack. The teacher of the class searched the backpack but found no money. When questioned, the two eight-year-old girls accused each other and then decided to accuse another student, a young boy. At this point the teacher had all three students in the hallway when another teacher (the school music teacher) happened along and took charge of the situation. She had all three students remove their shoes and socks but still no stolen money was found. The music teacher then decided to include the school guidance counselor in this travesty. The guidance counselor and the music teacher dismissed the boy back to class evidently because they thought him wrongly accused. They then took the two girls to the rest room where they made each girl disrobe. Still no money was found. After putting their clothes back on, the girls were taken to the office of the principal who interrogated them in the office. Evidently the principal quickly lost interest in this game so the girls were again placed in the charge of the music teacher and the guidance counselor. Unbelievable as it is, these two again took the girls to the restroom and made them disrobe a second time. Of course no stolen money was found. As could be expected the parents of the two girls went besirk and demanded a school board investigation which concluded that the music teacher and the guidance counselor "committed a gross error in judgement." Despite the superintendent's recommendation for dismissal, neither of the two received any serious sanctions.

Drug Searches by Urine Tests

The subject of drug searches through urine testing has become a popular topic for litigation within the past few years. So far the Courts have been unreceptive to mandatory drug tests for students unless the tests are directly related to participation in athletics. This judicial aversion to student drug testing is illustrated by a case which occurred in Arkansas and was decided by the Federal District Court in 1985.[xii] In this case some students were in a school restroom when another student entered to the odor of marijuana. She reported the incident and all three students were interviewed separately. As a result, all three students were required to submit to a urine test. At the specified time each girl was escorted into a restroom and observed by a female school administrator while the student urinated into a vial. One of the students tested positive and subsequently withdrew from school. She later brought an action against the school for allegedly violating her Fourth Amendment rights. The Court determined that the girl would have been expelled anyway on the basis of the testimony of the other student but held that the school did, indeed, violated her Fourth Amendment right against unreasonable search and seizure. The Court found the forced urine test to be an unreasonable search because a positive indication from the test only indicated that the student had at some time ingested some marijuana-like substance. The test could not determine if the student had possessed the drug at school, used it at school or even was under the influence of it while at school.

In another case a New Jersey school board adopted a policy whereby each student was required to undergo a physical examination prior to entering school each Fall.[xiii] The purported reason for the examination was to "identify the existence of any physical defects, illnesses, or communicable diseases." Part of the examination included a test of each student's urine to detect the presence of any controlled substances, unauthorized prescription drugs or alcohol. When this requirement was challenged the school board wisely defended by saying that the examination was not a violation of the Fourth Amendment rights of the students because no sanctions were attached to any positive indication from the urine test -- merely that the parents of the students would be notified and the student referred for appropriate treatment. Because the school treated such drug or alcohol use as a departure from normal health and not a criminal matter, the school board argued that their policy was not subject to Fourth Amendment restrictions. Unfortunately, the Court disagreed stating that the policy violated the students' legitimate expectations of privacy and personal security in violation of the requirements contained within the Fourth Amendment.

As mentioned above, the courts have been more receptive to mandatory drug tests for student athletes if the school has a rational basis for requiring the test. However, in one Texas case a school district policy requiring students in grades six through twelve to submit to urine testing prior to participating in any extra-curricular activity was found to be unacceptable.[xiv] In this case the Court struck down the school district policy because, the Court said, the school district had not demonstrated that a drug problem existed within it's student body but rather was responding to a perceived problem of general societal abuse. Because the Court found no compelling, or even, substantial governmental interest on the part of the school, the privacy expectations of the students won out.

In an Indiana case, a school district recognized that a drug problem existed within its student body and sought to develop a rational means with which to deal with it.[xv] In this case the school district developed a drug testing program for all its interscholastic athletes. The athletes were required to complete a consent form prior to competition and if they failed to submit such form, they were excluded from competition. Athlete names were drawn randomly for students to take the test. Furthermore, the tests were administered in a manner to insure a genuine urine sample while reasonably respecting the modest of the student athlete. No school or criminal sanctions were imposed for a positive test indication and there were follow-up tests to insure accuracy. The most severe sanction was exclusion from the athletic program. The policy was challenged in Federal District Court which upheld the school district so the appeal went to the Seventh Circuit in Chicago. The Court found that athletes have a somewhat limited expectation of privacy because their various sports activities involve a certain amount of "communal undress." Furthermore, said the Court, the school has a strong interest in preventing drug abuse and this policy represented a rational solution to achieve that interest. As a result, the Court upheld the policy finding no violation of the restrictions contained with the Fourth Amendment.

A similar case occurred in Oregon where a school district determined that several of their student athletes had suffered drug-related injuries or illness and that some of the athletes were even participating in drug-culture organizations.[xvi] In this policy each athlete would be drug-tested at the beginning of the season and then randomly thereafter. The policy was challenged on the basis that the tests were performed without "individualized suspicion".

The Federal District Court held that while the school district needed neither a warrant nor individualized suspicion, it was required to demonstrate a compelling governmental interest. On balance, the Court held that the school district did, in fact, demonstrate such a compelling interest by showing that there had been specific drug-related athletic injuries and problems, that student athletes serve as role models for the other students and that this program was implemented only after other, less intrusive attempts, had failed. This case made its way to the United States Supreme Court which, evidently, decided to set straight the law of the land concerning mandatory drug testing of student athletes. In upholding this school district policy, the Supreme Court said that the "reasonableness of a search is judged by balancing the intrusion on the individual's Fourth Amendment interests against the promotion of legitimate governmental [not compelling] interests. The Court easily found a legitimate governmental interest and stated the "the importance of deterring drug use by all this Nation's schoolchildren cannot be doubted. Moreover this [school district policy] is directed more narrowly to drug use by athletes, where the risk of physical harm to the user and other players is high"[xvii]

More recently the United States Supreme Court expanded the rights of public schools to test students for illegal drugs. Relying heavily on the above discussed U.S. Supreme Court case, *Vernonia School District v. Acton* (515 U. S. 646 (1995)), the U.S. Supreme Court reversed the United States Court of Appeals' for the Tenth Circuit holding that the drug testing policy enacted by the Board of Education of Pottawatomie County (School District) to test all students involved in extra curricular activities was unconstitutional. In *Board of Education of Independent School District No. 92 of Pottawatomie County et al. v. Lindsay Earls et al.*, the Court ruled that such drug testing is not an impermissible violation of the Fourth Amendment.[xviii]

The balancing of students' rights versus the governmental interest has been at issue in several student rights cases (*Tinker v. Des Moines* 393 U.S. 503; *New Jersey v. T.L.O.* 469 U. S. 325; *Vernonia School District v. Acton* 515 U. S. 646). In *Tinker* the Court held that "school children... do not shed their constitutional rights... at the school house gate". *New Jersey v. T.L.O.* established that the standard of reasonableness applies in public school searches of students and that students enjoy a reasonable expectation of privacy in their personal belongings brought to school. The *Vernonia* Court allowed suspicionless drug testing of student athletes due to "special needs" such as a community history of abuse and the risk to the athlete (also the athletes were viewed as "the leaders of the drug culture"), as well as the administrative nature of the search (positive tests simply resulted in non- participation, and not referral to law enforcement nor punitive school sanctions). The District Court granted judgment in favor of the School District. The Court of Appeals reversed holding the policy in violation of the Fourth Amendment concluding that a school "must demonstrate that there is an identified drug abuse problem among a significant number of those subject to the testing such that testing that group of students will actually redress its drug problem." The U.S. Supreme Court reversed the decision of the Court of Appeals finding the drug testing policy constitutional.

The school district which administers all public schools in rural Tecumseh, Oklahoma adopted the Student Activities Drug Testing Policy. This policy requires middle and high school students to submit to drug testing prior to participating in any extracurricular activity, as well as random testing during participation periods, and agree to be tested at any time given reasonable suspicion. In practice the policy was enforced for competitive extracurricular activities such as academic team, show choir, and marching band. Lindsay Earls was a member of music activities while Daniel James sought to participate in Academic team. Earls and James together with their parents brought a 42 U.S.C. §1983 action against the school district and "challenged the policy both on its face and as applied to their participation in extra curricular activities. They cited violation of the Fourth Amendment as applied through the Fourteenth Amendment asserting that the School District failed to identify a special need for such testing and that the "drug testing policy neither addressed a proven problem nor promises to bring any benefit to the students or the school.")

The Supreme Court addressed the following issues as they applied to this case -- the Fourth Amendment exception for suspicionless searches of students, the nature of the privacy interest of the students and character of the governmental intrusion, and the "nature and immediacy of the government's concern and efficacy of the policy in meeting them."

The collection and testing of urine samples indicate a Fourth Amendment search (*Vernonia*). The Court cited *Skinner v. Railway Labor Executives' Assn.*, 499 U.S. 602(1989) and *National Treasury Employees v. Von Raab*, 489 U.S. 656 (1989) in differentiating the probable cause requirement of the Fourth Amendment from one of reasonableness, and the nature of administrative searches given the governmental interest in the safety of driving trains or U.S. Customs officials enforcing drug trafficking laws. The court also cited *Vernonia* quoting *T.L.O.* that such probable cause and warrant requirements would interfere with swift discipline in the schools. Suspicionless drug testing of athletes was upheld in *Vernonia.* The privacy rights of students were balanced with the governmental interest in promoting safety of student athletes. It has been sustained that schools have a responsibility to promote discipline and safety of students. In *Vernonia*, student athletes were found to have a lesser expectation of privacy citing communal dressing and showers in the locker room. Earls et al contended that students in other extracurricular activities enjoy a greater expectation of privacy than those athletes sharing a locker room. The Court, though with a dissenting opinion, found that this distinction was not governing but rather gave more weight to the school's "custodial responsibility and authority." The Court further stated that some of these competitive extracurricular activities such as show choir also result in occasional travel and communal undress.

In *Skinner*, the Court held that urination is "an excretory function traditionally shielded by great privacy" (*Skinner,* 489 U.S. at 626). At issue was the method of urine collection and utilization of the results. In this case, students were allowed to urinate behind the closed stall doors while a monitor listened for normal sounds of urination (In Vernonia, the boys used urinals). This, method was found to be a "negligible" intrusion. The policy at hand maintains that the results be kept in a file separate from the student's other files and only released on a "need to know" basis. Earls et al. argued that the records were not kept in a confidential manner citing an instance in which the choir director carelessly left a list of student's medications (which must be submitted for the drug testing) where other students could easily view the confidential information. The Court did not find that this increased the character of the intrusion As with the instances in *Vernonia*, the results of the drug test were used in an administrative, not criminal manner. The policy at hand allowed positive-testing students to continue participating in extracurricular activities upon parent notification, drug counseling and submitting to further drug tests. After a second positive test, the policy required suspension from all extracurricular activities for fourteen days, completion of four hours of substance abuse counseling and submission to monthly drug tests. Only following the third positive test was student participation in extracurricular activities suspended for the remainder of the school year or 88 days.
Concerning the methodology of the collection of the urine and the management of the test results the Court held that the privacy intrusion was "not significant."

The Court then addressed the "nature and immediacy of the government's concerns and the efficacy of the policy in meeting them. The Court referred to results published in the report Department of Health and Human Services, Monitoring the Future: National Results on Adolescent Drug use, overview of Key Findings (2001) which stated an increase in the number of 12th grade students using illicit drugs from 48.4% in 1995 to 53.9% in 2001. "Indeed, the nationwide drug epidemic makes the war against drugs a pressing concern in every school" stated the Court. The Court also dismissed Earls' et al. argument for testing based on individualized suspicion as the Court found that the policy would be less intrusive to potential target groups. The Court held that testing students in extracurricular activities was an effective method of addressing the concerns of "preventing, deterring, and detecting drug use" although allowing that the instances in *Vernonia* were a "closer fit" to the requirement of finding an identified drug problem "fueled by the role model effect of the athletes".

Therefore the Court found the drug testing policy at Tecumseh to be constitutional but cautioned that "Within the limits of the Fourth Amendment, local school boards must assess the desirability of drug testing school children. " In upholding the constitutionality of the policy, we express no opinion as to its wisdom." It should also be noted that this was a 5-4 decision, with the dissenting opinion arguing some of the interpretations of *Vernonia* and questioning the benefit of testing so many students "most of whom are probably not involved in drug use", while barring students who may benefit from positive interactions within extracurricular activities. In *Vernonia* there was a documented drug abuse problem, even with athletes, and the policy addressed the issue. In *Tecumseh*, while there were instances of drugs on campus, the district reported that drugs were not a major problem. The dissenting opinion also questioned applications of *Skinner* and *Von Raab*, as well as *Chandler,* and quoted a 1928 opinion: "Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." (*Olmstead v. United States* (277 U.S. 438, 495)). "That [schools] are educating the students for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." (*West Virginia Bd. of Ed v. Barnette*, 319 U.S. 624, 637(1943)).

Weapons Searches

In cases where public schools are searching for weapons, at least the Third District Court of Appeals seems to have relaxed the constitutional requirements slightly. A case originating in Dade County was reported in which the school district program of random classroom searches for weapons was found by the Circuit Court to be unconstitutional (*In the Interest of J.A.*).[xix] That program involved members of a search team, dressed in uniforms which identified them as search team members, entering classrooms unannounced with hand-held electronic metal detectors. In those random searches they would scan each student for weapons and any which were found were turned over to the Dade County School District police (Dade County School District is one of five school districts within Florida to have it's own police force). If a student refused to be searched, he or she would be sent to the office for automatic suspension. Students found to be in possession of items illegal under Florida law were arrested and subject to prosecution. The teams were supposed to choose schools and classrooms randomly but the Circuit Court found that such was not always the case. Some schools in Dade County were never searched while others were searched more than twenty times. On December 16, 1994, J.A. was a student at Jackson Senior High School sitting in his class when the search team arrived and informed the students that they were going to be searched. J.A.'s jacket was hanging on the side of his chair. The search team observed students passing the jacket to a shelf in the back of the room and when the team searched the jacket a gun was found. J.A. claimed ownership of the jacket but denied that he owned the gun. He was arrested for carrying a concealed firearm (in violation of Florida law) as well as having a gun on public school premise (also a violation of Florida law). Both of these offenses are felonies within the State. The County Circuit Court found that J.A. had an expectation of privacy within his jacket and that any search conducted by the school district in this manner must meet the *probable cause* standard. Furthermore, the Court held that the search was in violation of the Fourth Amendment and suppressed the evidence found (under the exclusionary rule) in the delinquency petition filed against J.A..

Fortunately for society the Court of Appeals for Florida's Third District recognized the extreme danger to all persons resulting from weapons within the school environment. The Court applied the "balancing test" to determine if J.A.'s expectation of privacy outweighed the School Board's concern for the safety and well-being of the other students as well as school personnel. School children, said the Court, have a reasonably lessened expectation of privacy than the other members of society. The Court then acknowledged that in recent years, school disorder had increased with drug use and violent crimes becoming major social problems. In the years prior to the implementation of this search policy, Dade County Public Schools reported both homicides and aggravated batteries as well as the confiscation from students of a very high number of weapons, including handguns. "The immediacy of the Board's concern", said the Court, "for student safety and the safety for all school personnel is well justified."[xx]

---

1. F.S.A. §232.25

2. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

3. Id.

4. U.S. Const. Fourth Amendment

5. *T.J. v. State of Florida*, 538 So.2d 1320 (2nd DCA 1989).

8. F.S.A. §232.256(3)

9. *Dennis Woolley v. State of Florida*, 459 So.2d 1101 (2nd DCA 1984).

10. F.S.A. §232.256(4)

11. *People v. D.*, 34 N.Y. 2d 483, 315 N.E. 2d 466 (1974).

12. *Bellnier v. Lund*, 438 F. SUPP. 47 (N.D.N.Y 1977)

13. *Jenkins v. Talladega City Board of Education*, 115 F.3d 821 (11 cir. 1997)

14. *Anable v. Ford*, 653 F.Supp. 22 (W.D. Ark. 1985)

15. *Odenheim v. Carlstadt-East Regional School District*, 510 A.2d 709 (N.J.Super.Ch.Div.1985)

16. *Brooks v. East Chambers Consolidated Independent School District*, 730 F. SUPP. 759 (S.D.Tex.1989)

17. *Schaill v. Tippecanoe County School Corporation*, 864 F.2d 1309 (7thCircuit 1988)

18. *Acton v. Veronia School District*, 796 F. SUPP.1354 (D.Or. 1992)

19. *Veronia School District v. Acton*, 515 U.S. 646 (1995)

20. *Board of Education of Independent School District No. 92 of Pottawatomie County et al. v. Lindsay Earls et al.*. Certiorari to the United States Court of Appeals for the Tenth Circuit United States Supreme Court No. 0 1-332 536 U.S. (2002)

21. *State v. J.A.*, 679 So.2d 316 (Third DCA 1996)

22. Id.

Search and Seizure of Students in Public Schools: 2002 Update of Fourth Amendment Cases[1]

by

Jacqueline A. Stefkovich[2]
Professor & Department Head
The Pennsylvania State University
9/15/02

The Fourth Amendment to the U.S. Constitution guarantees "the right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by government officials. New Jersey v. T.L.O., 469 U.S. 325 (1985), a landmark United States Supreme Court decision handed down on January 15, 1985, addressed the authority of public school officials to conduct searches of students on school grounds and established that students have Fourth Amendment rights.

According to this Court, students' Fourth Amendment rights must be balanced against school administrators' obligations to maintain order and discipline in the schools. Part of this obligation implies keeping schools safe for students. While the T.L.O. decision did not specifically address itself to mass (metal detector, drug testing) and highly intrusive (strip) searches, legal scholars and subsequent courts generally considered such searches to be illegal. In the past few years, several lower courts (Williams, 1991; Widener, 1992; Cornfield, 1992; Dukes, 1992) have upheld such searches in the name of safety.

In the Williams case, a 6th circuit court upheld the strip search of a female student for drugs. Since the first case was decided in 1973, no other court had been willing to uphold such an intrusive search. There had been "strip" searches upheld, but these were minimally intrusive, generally involving only the removal of outer garments such as jackets or shoes. After Williams, two other lower courts (Widener, 1992 and Cornfield, 1992) followed suit, upholding very intrusive searches of students. Both of these cases involved male high school students and both searches were for drugs. In Widener, the student was asked to remove his jeans. In Cornfield, the student was required to remove all of his clothing including his underwear. In both cases, the strip search was conducted in the presence of school officials of the same gender as the student being searched and no drugs were found.

Thus far, such intrusive searching seems to be limited to searches for drugs with a few exceptions. In Mark Anthony B. (1993) a strip search for $100 was not upheld but in Singleton (1995), a strip search and pat-down of a male student's crotch area for $150 was legal and the school was immune from §1983 damages. In McClung (1995), a U.S. district court in Indiana held a strip search of a class for $4.50 illegal. While the school was not held liable for damages because such searching was not custom, the court held that the principal, teacher, and food service worker were not entitled to immunity because a strip search for such a small amount of money was clearly a constitutional violation. In Kennedy (1998), New Mexico's Supreme Court ruled that the strip search of ten students for a missing ring was unconstitutional in that the group was too large for each of its members to be individually suspect. A federal district court in South Dakota (Konop, 1998), refused to grant summary judgment for the strip searching of two 8th grade girls for stolen money.

---

[1] The research reported in this paper was made possible in part by a grant from the Spencer Foundation. The data presented, the statements made, and the views expressed are the sole responsibility of the author.

[2] The author would like to thank Robert Cox, Richard Gerace, and Michelle Kaminsky, students at Temple University's Beasley School of Law, and Janis Streeter and Thomas McDonough, former Temple Law students, for their assistance with this paper.

In Pennsylvania, a federal district court (Sostarecz, 1999) ruled that a strip search by the school nurse was not reasonable after she had determined that the student's vital signs showed no instance of drug use. This court refused summary judgment regarding the §1983 claims against the nurse but did grant summary judgment for the principal because there had been no previous such instances as to put him on notice. But in Talladega (1997), an eleventh circuit court refused to award §1983 damages for a strip search of two elementary students for $7.00 because it was not necessarily so that school officials would have known such a search was illegal because there was no precedent in the state or circuit.

A federal district court in Virginia used similar logic in refusing to award damages to a veterinary student who was strip searched after being accused of cheating on an exam (Carboni, 1996). On the other hand, in response to concerns about strip searching, seven states have passed laws prohibiting administrators from conducting strip searches in public schools: California, Iowa, New Jersey, North Carolina, Oklahoma, Washington, and Wisconsin.

As for metal detector searches, in Dukes, a New York court was the first to legalize the use of metal detectors in public schools. These searches were for weapons. Since Dukes, other lower courts hearing cases involving cities such as Los Angeles, Chicago, and Philadelphia (People v. Latasha W., 1998; Pruitt, 1996; In the Interest of S.S., 1996; In the Interest of F.B., 1999) and other large districts such as Dade County, Florida (State v. J.A., 1996) have followed suit.

Similarly, there is precedent for conducting other types of reasonable searches without individualized suspicion if safety issues are involved. For example, in the California case, In re Alexander B. (1990), a small group of students was searched because "someone" in the group was said to possess a gun. The element of danger was considered adequate to justify the search.

This safety-based rationale for conducting non-individualized searches also holds true for drug testing. Until 1995, the lead (Supreme Court) cases addressed the rights of adult employees in work situations (Skinner, 1989; Von Raab, 1989). In school situations, the results were mixed. In general, searches involving mass searching of students for drugs had not been upheld (Odenheim, 1985; Brooks, 1989), however, exceptions were made such as in the case of student athletes (Schaill, 1988).

In 1995, the United States Supreme Court handed down its second opinion on students' Fourth Amendment rights. In this decision, Vernonia School District 47J v. Acton, the Court maintained that drug testing of student athletes without individualized suspicion was legal under certain circumstances. Here, the Court applied a three-tier test making the legality of the search contingent upon: the need for the drug testing, the expectation of privacy of the persons to be tested; and obtrusiveness of the search. The High Court did not rule explicitly on whether or how this decision might be applied to other student groups or to other types of mass searches such as metal detector searches or random locker searches. Justice Ginsburg, in a separate opinion, suggested that the Court had reserved its opinion in this issue.

Until this year's (2002) U.S. Supreme Court decision in Earls, lower courts were divided as to whether Vernonia could be extended to the drug testing of groups other than student athletes. In Todd v. Rush (1998), a seventh circuit court ruled that mandated drug testing for students participating in extracurricular activities was legal while Colorado's Supreme Court, in Trinidad School District No. 1 v. Lopez (1998), decided otherwise. The Trinidad court held that Vernonia did not apply to the drug testing of band members because, unlike athletic teams, participation in the band was not wholly voluntary and there was a qualitative difference in the communal undress exhibited by band members as opposed to athletes. In Miller v. Wilkes (1999), an eighth circuit court used the Vernonia standard in ruling that drug testing students in all extra-curricular activities was constitutional. In Earls (2002) the United States Supreme Court ruled that drug testing of students involved in extracurricular activities is legal.

Three other federal courts -- in the fourth (DesRoches, 1998), eighth (Thompson v. Carthage, 1996), and ninth (McGlothlin, 1997) circuits -- have interpreted the Vernonia standard as allowing school administrators authority to search students without individualized suspicion in situations other than drug testing. Below is a list of cases addressing these and other relevant issues.

GENERAL

Gruenke v. Seip, 225 F.3d 290 (3d Cir. 2000). A member of a swim team who was asked by her coach to take a pregnancy test, claimed violations of state law and damages under §1983. The 3rd Circuit Court of appeals overturned a lower court decision by ruling that the coach's request did violate the student's 4th amendment rights and that he was not entitled to qualified immunity relative to disclosure of student's personal and medical records.

Hedges v. Musco, 204 F.3d 109 (3d Cir. 2000). A math teacher at Northern Highlands Regional High School in New Jersey observed that a female student in his class seemed uncharacteristically talkative and outgoing and that her face was flushed and her eyes were red and glassy. He did not smell anything on her, but he suspected that she was under the influence of alcohol or another drug. He reported his views to a school administrator who sent the student to the school nurse. The student was administered a drug test. Parents brought suit claiming, among other things, violation of due process and 4th Amendment rights as well as assault and battery. The 3rd circuit court held that neither 4th nor 14th Amendment rights had been violated, that the school drug testing policy was not unconstitutionally vague, and that the manner of administering tests was not unconstitutionally vague.

B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260 (9th Cir. 1999). A former student brought suit against the Quincy High School in Plumas County, California. School officials asked students to wait outside their classroom while a trained canine sniffed backpacks, jackets, and other belongings which the students left in the room. The dog also signaled students directly upon entering and leaving the classroom. The court held that the sniffing was a search and that the search was unreasonable because there were no reported drug instances in the school. In regard to money damages, school officials were granted qualified immunity in that their actions did not violate clearly established rights that a reasonable person would have been aware of in that, at the time of the case, it was not clearly established that dog sniffing in schools constitute a search under the Fourth Amendment.

Bridgman v. New Trier H.S. District 203, 128 F.3d 1146 (7th Cir. 1997). A male high school student exhibited what appeared to be signs of drug use (alleged unruly behavior, dilated pupils, bloodshot eyes, giggling). As a result, he was subjected to a "medical assessment" by the school's Health Service Coordinator and was searched by the school's Student Assistance Program Coordinator who had initially noticed his behavior. A federal circuit court maintained that the search and the ordering of a medical assessment were legal and that the school's policy requiring written reports about student searches was constitutional.

* * *

Brousseau *ex rel.* Brousseau v. Town of Westerly *ex rel. Perri*, 11 F. Supp. 2d 177 (D.R.I. 1998). Sarah Brousseau's mother brought this suit on behalf of her daughter, a sixth grader. Here, the issue was whether Sarah's 4th and 14th Amendment rights were violated by school officials when they conducted a warrantless search of Sarah in an effort to find a missing knife. Assistant Principal John Carson conducted pat down searches of the students. The search consisted of patting down area in front and back of pockets and ankles. The court held that the search was reasonable where it was limited to a pat down by officials of the same gender and the governmental concern of finding a knife in a school is a compelling issue. They granted summary judgment for the school district.

James *ex rel.* James v. Unified School Dist. No. 512, 959 F. Supp. 1407 (D. Kan. 1997). A school resource officer assigned to Shawnee Mission Northwest High School received a parental tip that James had a handgun in his vehicle and had brought it into the school previously. The officer shared this information with the school's associate principal. The following day, the officer, the associate principal, and a campus police officer got James from class and all four went to James's car for the search, which yielded a gun. The U.S. District Court of Kansas granted summary judgment on James' §1983 claims for the school resource officer, associate principal, superintendent of the school district, and the Shawnee Chief of Police based on a theory of qualified immunity, as the law was not clearly established at the time.

****

In re D.E.M., 727 A.2d 570 (Pa. Super. Ct. 1999). School officials were informed by police that they had received an anonymous tip that a student possessed a gun on school property. D.E.M. was called to the office where he emptied his bag. Nothing was found. School officials gained D.E.M.'s permission to be searched. A knife was found in his pocket. He also admitted to having a gun in the pocket of a jacket in another student's locker. The other student unlocked his locker and the gun was found. D.E.M. was arrested. Here, the court held that school officials did not act as agents of the police because the purpose of the search and seizure was primarily to ensure the safety of the students for whom the school officials are responsible, and police did not coerce school officials. The school official's conduct was reasonable under the circumstances. The trial court's finding that suppression was warranted was reversed and the case was remanded for trial.

In re Dengg, No. 97-P-0113, 1999 WL 259838 (Ohio Ct. App. May 3, 1999).
Streetsboro City Schools granted permission to the police to do a sweep of the school with canines to detect contraband. After this sweep, police searched the parking lot. One of the canines signaled a car owned by the appellee's father. A pipe with marijuana residue was found. A magistrate maintained that the warrantless search was not reasonable and the evidence should be suppressed. An Ohio state appeals court reversed this ruling, holding that the sniff was not a search under the 4th Amendment and that the canine's alert to the police created probable cause for the search. The court also ruled that T.L.O. standard does not apply to police but that the automobile exception to the warrant requirement applies to parked as well as moving vehicles.

State v. Tinkham, 719 A2d 580 (N.H. 1998). Two students at Kingswood Regional High School reported to the principal that they saw a plastic bag containing marijuana in a book bag belonging to a fellow student. Upon questioning this student, Principal Brooks found marijuana. The court held that the search was reasonable, as was the scope of the search, in that Brooks was justified in the initial search to prevent future drug sales, and the search was not excessively intrusive. In addition, Brooks did not act as an agent of the police and was thus not required to administer Miranda rights.

State v. Whorley, 720 So.2d 282 (Fla. Dist. Ct. App. 1998). Pasco High School Assistant Principal Forbes was approached by two students who claimed Whorley, a student at the school, had "ecstasy." Forbes located Whorley in the hallway and took him to the office. Whorley produced a bag of ecstasy after being informed by Forbes that he would be searched. The court held the search reasonable in that the inception of the search was justified because of the tip and the scope was reasonable.

State v. Marola, 582 N.W.2d 505 (Wis. Ct. App.), *review denied,* 585 N.W.2d 159 (Wis. 1998). Marola was a student at New Berlin West High School. He had been previously cited for smoking on school grounds. A teacher entered a bathroom where Marola was present and smelled smoke. The teacher asked him to empty his pockets because of the odor, and Marola's history of smoking. Marola produced a large black wallet. The teacher asked him to open it. When Marola did, a bag of marijuana fell out. Marola was charged with possessing drugs within 1000 feet of school. The court held that the search was reasonable under the two prong *T.L.O.* standard where the first question to empty his pockets was justified and opening the wallet was sufficiently related to the initial suspicion that Marola was smoking.

In re David J.M., 587 N.W.2d 458 (Wis. Ct. App. 1998). A police officer, on a routine bike patrol of the high school, saw David put his hand in his pocket suspiciously. Upon confrontation, David stated that he had put a cigarette in his pocket. David then pulled out a bag of marijuana which he had tried to conceal in his hand, after the officer asked him to empty his pockets. The court held that the stop was reasonable, the search was proportional to that stop and incident to the arrest for possession of tobacco by a minor. Because David had reason to believe he was in custody during the confrontation with the officer, this gave the officer the right to search further. Thus, the evidence should not be suppressed.

Packer v. Board of Educ. Of Thomaston, No. CV 970075242, 1998 WL 40487 (Conn. Super. Ct.) *aff'd in part, rev'd in part,* 717 A.2d 117 (Conn. 1998). Packer, a senior at Thomaston High School, was pulled over by a police officer, the officer saw marijuana in the ashtray. A subsequent search revealed more marijuana in the trunk. Packer's arrest was reported to the School District. The School Board voted to expel him. The appeals court affirmed the injunction in that Packer did not have adequate notice that possession of two ounces of marijuana off school grounds would subject him to expulsion and the school expulsion statute is too vague to be Constitutionally enforceable.

Commonwealth v. J.B., 719 A2d 1058 (Pa Super. Ct 1998). Singleton, a school police officer, noticed appellant staggering with his eyes closed. Appellant's speech was slurred. Singleton took the student to an office and ordered him to remove everything from his pockets. Finding nothing, he shook appellant's pants and found a bag of marijuana. The court held that it was reasonable, in view of appellant's behavior, for Singleton to suspect that a search would turn up evidence of a violation of the law. Suppression is not warranted where suspicion is reasonable and the search is related to a well founded suspicion.

State v. Angelia D.B.,564 N.W. 2d 682 (Wis. 1997). An assistant principal observed one student with a knife and received information of another student who had a gun. The male school liaison officer was called and spoke with the informant who identified Angelia. The officer approached Angelia and conducted a pat-down. Her backpack was also searched. While Angelia waited in the school office, there was a search of her locker. No weapons were found. When asked, Angelia stated that she did not have a weapon. A search of her person was conducted by the male officer. He lifted up the bottom of her shirt to reveal her waistband. The officer noticed a knife and seized the item. The court weighed the gravity of a concealed knife within a school and the interest in maintaining a safe environment as substantial against the student's expectation of privacy. Therefore, the search was reasonable.

* * *

In re Haseen N., 674 N.Y.S.2d 700 (N.Y. App. Div. 1998). To curb the egg-throwing that is common around Halloween, the principal of Intermediate School 390 approved a pat-down search of students as they arrived. A guidance counselor patted down Haseen N., 13, and felt something hard in the boy's midsection. The counselor told the Safety Sergeant at the school to investigate further. Upon unzipping Haseen N.'s jacket, the Safety Sergeant found a gun. The N.Y. Supreme Court found that the search was justified and reasonable in that the method used was the least intrusive possible and properly balanced the student's interest in privacy with the school's interest in order.

Shoemaker v. Texas, 971 S.W.2d 178 (Tx. Ct. App. 1998). The court held that the search of a student's school locker was reasonable under federal and state constitutions since the student was the only one present when the credit cards were stolen, which gave rise to reasonable suspicion.

In re. P.J.K., No. C1-98-351, 1998 WL 713479 (Minn. Ct. App. 1998). A high school liaison police officer and an assistant principal noticed P.J.K. inappropriately dressed and asked him to step into the assistant principal's office. Because the officer and assistant principal smelled marijuana, they asked P.J.K. to empty his pockets which contained a cigarette lighter and a wad of cash. Next, the assistant principal conducted a pat-down search because she felt that P.J.K. was intentionally avoiding completely exposing the inside of his pockets and felt that P.J.K. may have a weapon. The pat-down search yielded marijuana. The Court of Appeals of Minnesota affirmed the legality of the search because the officer and the assistant principal had reasonable suspicion to conduct the search based on the totality of the circumstances.

K.K. v. State, 717 So. 2d 629 (Fla. Dist. Ct. App. 1998). A student informed a school official that other students were smoking marijuana in the boys' restroom. The school official entered the restroom followed by a school resource officer. Heavy smoke and smoldering butts on the floor were apparent. The school official searched the 6-8 boys who were in the restroom and found marijuana in K.K.'s wallet. Affirming the lower court, the Florida District Court of Appeals held that the search was legal because the school official acted on reasonable suspicion that the boys possessed marijuana.

D.I.R. v. State, 683 N.E.2d 251 (Ind. App. 1997). An Indiana high school routinely had an officer at the front door who used a hand held metal detector to check for weapons. A student arrived late, after the officer had locked away the detector. The officer began a manual search of the student's pockets. During the search he discovered marijuana cigarettes, a pipe, and rolling papers. The court recognized that even though students were aware of the metal detector search conducted each morning, it did not provide an implied consent to a more intrusive physical search. Thus, the manual search did not meet the reasonableness standard and was in violation of the Fourth Amendment.

J.A.R. v. State, 689 So.2d 1242 (Fla. Dist. Ct. App. 1997). An 8th grade student at Seth McKell Middle School informed a teacher that J.A.R. had a gun. The teacher sent this student to the assistant principal who asked the student if he was sure which student replied in the affirmative. The assistant principal then called the school resource officer to assist in this matter. The two took J.A.R. out of class and asked him if he had a gun. When J.A.R. admitted he had a gun, the officer conducted a pat-down search and recovered the weapon. The Florida District Court of Appeals affirmed the legality of the search. Citing People v. Pruitt, the court found that the student tip provided reasonable suspicion to take J.A.R. from class for questioning; also, J.A.R.'s admission of having a gun made the scope of the pat-down search permissible.

Juan C. v. Cortines, 647 N.Y.S.2d 491 (N.Y. App. Div. 1996), *rev'd*, 679 N.E.2d 1061 (N.Y. 1997). A school security aide at William Howard Taft High School observed Juan C. walking toward him in a hallway with a bulge that resembled the handle of a gun weighing down the left side of his jacket. The aide grabbed Juan C., but the student ran away. A hallway chase ensued. The aide grabbed Juan C. at the bulge in his jacket. Another aide removed the gun from Juan C.'s jacket. Bronx County Family Court determined that the search was unreasonable because the outline of the gun was not visible and the bulge did not take any specific shape or form or look suspicious; this determination was not appealed. An appeal to the New York Court of Appeals was sought regarding whether school authorities could reexamine the issue of the search in school proceedings; the court found that collateral estoppel did not bar this reexamination as the school authorities were not a party to the Family Court proceedings.

STRIP SEARCHES

Thomas *ex rel.* Thomas v. Roberts, 261 F.3d. 1160 (11th Cir. 2001). Sergio Evans, a 5th grader at the West Clayton Elementary School in Georgia, brought an envelope to school containing $26 that he had raised selling candy for a school trip. He laid the envelope on a table near the teacher's desk. The envelope was later missing. Strip searches of the class were conducted by the teacher and the DARE officer who was there to teach a class. The 11th Circuit Court held that strip searches conducted without individualized suspicion were unreasonable. The district was not liable under §1983 because staff had not received adequate training or supervision theory. However, the county could be held liable under § 1983 for the actions of its officer.

Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997). Two second grade girls were strip searched after being accused of taking a missing $7. The court did not rule on the reasonableness of the search but did state that §1983 damages would not be awarded because school officials would not necessarily have known that the search was unreasonable because there was no precedent in either Alabama or in the 11th Circuit.

Cornfield v. Consolidated High School District 230, 991 F.2d 1316 (7th Cir. 1993). A male high school student was suspected of "crotching" drugs. He was ordered to remove all his clothes and school authorities visually inspected his naked body. No drugs were found, but the search was upheld as reasonable.

Williams by Williams v. Ellington, 936 F.2d 881 (6th Cir. 1991). In a search for drugs, a female high school student was requested to remove her t-shirt and lower her jeans to her waist. The search was upheld.

Doe v. Renfrow, 631 F.2d 91 (7th Cir. 1980), reh'g denied, 635 F.2d 582 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1980). Following a canine search, eleven junior and senior high school students were strip searched for drugs. The canine search was reasonable; the strip searches that followed were not.

****

Sostarecz ex rel.Sostarecz v. Misko, No. Civ. A. 97-CV-2112, 1999 WL 239401 (E.D. Pa. March 26, 1999). Sostarecz, a female student at Emmaus Junior High School in Pennsylvania was sent to the nurse's office by her health teacher for suspected drug use based on bizarre actions in class. The nurse's exam of the girl's vital signs and pupils showed no evidence of drug use. Sostarecz claims that Nurse Weider took her into the bathroom, ordered her to remove her pants, and inspected her legs and private area. The court held that summary judgment regarding the §1983 claim was not warranted. Qualified immunity is not applicable because the search was something the district employees should have been aware was unconstitutional and a right had been clearly established. Determining that drug use had not occurred based upon the pupil and vital signs exam, it was not reasonable to search the student for drugs because there was no reason to believe she possessed any. Summary judgment for Principal Misko was granted where it cannot be shown that any incident such as the instant one had occurred previously to put him on notice. Summary judgment for assault and battery is denied where it cannot be said as a matter of law that nurse's actions did not rise to that level. Summary judgment for intentional infliction of emotional distress is granted where the alleged acts clearly do not rise to that level.

Konop *ex rel.* Konop v. Northwestern School Dist., 26 F. Supp. 2d 1189 (D.S.D. 1998). Two eighth grade girls were strip searched by a female music teacher upon a request by the male principal. The two girls had allegedly been seen acting suspiciously upon commencement of the search, possibly exchanging money. These girls, Genzler and Konop, had 14 and 10 dollars respectively. The principal determined this was not the stolen money. The girls were told to remove their underwear, pants, and bras. Both girls were crying but felt they couldn't say "no." The court held that qualified immunity was not relevant since reasonable suspicion to strip search was missing, and there was a question of fact as to the principal's conduct in that a reasonable school official should have known that a strip search without reasonable suspicion is a violation of the students' rights. Summary judgment for the school district was not warranted.

Kelly v. Orleans Parish School Bd., No. Civ. A 97-1696, 1998 WL 419673 (E.D. La. 1998). At McDonough No.35 High School, forty-two dollars was missing from a band trip fund. A teacher performed a cursory search of the students but did not locate the money. The teacher called a security officer who inspected the students' bookbags, desks, and personal property. A vice-principal was called to assist the security officer in searching the males. Another vice-principal was called to strip search the females. The U.S. District Court for the Eastern District of Louisiana granted summary judgment for the school board, the teacher, and another individual. In its analysis regarding qualified immunity, the court determined that none of the parties violated Kelly's clearly established constitutional right(s). The court found that the teacher's cursory search was reasonable as no individual suspicion was necessary. Further, there was no evidence that the school board or the other individual acquiesced to strip searches or even had knowledge of any strip searches at the school.

Carboni v. Meldrum, 949 F. Supp. 427 (W.D. Va. 1996). A veterinary student was accused of cheating after she had left a make-up test to go to the women's lavatory and the secretary monitoring the test saw someone in the restroom stall with class notes. The student was subjected to a strip search by school officials and filed suit. The court granted summary judgment on the federal claims maintaining that the college was not on notice of violation of a clearly established constitutional right. The court refused to rule on additional state law claims.

Oliver by Hines v. McClung, 919 F.Supp. 1206 (N.D. Ind. 1995). All students in a physical education class were partially strip searched after two students reported a missing $4.50. Students were asked to remove shirts and undergarments. Pants were patted down and, in some instances, waistbands of the pants were checked. The court ruled that the school board and superintendent were not liable because there was no custom or practice of such searches in the school but that the principal, food service worker, and teacher who conducted the searches were liable under §1983 because such searches were a clear constitutional violation.

Singleton v. Bd. of Educ. U.S.D.500, 894 F. Supp. 386 (D. Kan. 1995). The school's assistant principal partially strip searched a 13 year old middle school student and patted down his crotch area after a woman accused him of stealing $150 from the front seat of her car. The court ruled the search was legal because it was justified at its inception and reasonable in light of the student's age, sex, and the nature of the wrongdoing. §1983 claims did not hold since the search was legal.

Widener v. Frye, 809 F. Supp. 35 (S.D. Ohio 1992). A former high school student brought a §1983 suit against school officials claiming that his Fourth Amendment rights had been denied when school officials subjected him to a strip search for marijuana. School officials asked the student to remove his jeans after they observed that the student was acting "sluggish" and after they detected what they believed to be the smell of marijuana on his person. The court ruled that the search was reasonable as a matter of law.

****

Kennedy v. Dexter Consolidated Schools, 10 P. 3d 115 (NM 2002). The New Mexico Supreme Court upheld the judgment against Dexter Consolidated Schools for conducting an unreasonable strip search. In this case, ten students were strip searched to their undergarments for a missing ring. A lower court held that although it was reasonable for school officials to believe that one of the ten students in the classroom had taken the ring, that group was too large for each of its members to be considered individually suspect. The New Mexico Supreme Court held that 1) for purposes of qualified immunity, these searches clearly violated established law; 2) the search was not justified at its inception and was excessive in scope; 3) lesser degree of counselor and superintendent's involvement did not entitle them to qualified immunity; 4) erroneous jury instruction delineating detention as a separate basis for liability was harmless error; 5) evidence supported employees' reckless indifference for purposes of punitive damages; 6) award of fees under §1988 required evidence of hours expended.

State v. Mark Anthony B., 433 S.E.2d 41 (W.Va. 1993). A student was strip searched for money. The search was not upheld because money did not pose the same sort of danger as drugs or weapons.

MASS OR RANDOM DRUG TESTING

Bd. of Education of Independent School District No. 92 of Pottawatomie County v. Earls, __ U.S. __, 122 S.Ct. 2559 (2002). The U.S. Supreme Court ruled that random drug testing of students involved in extracurricular activities is legal.

Vernonia School District 47J v. Acton, 515 U.S. 646 (1995). A seventh grade student was not permitted to participate in interscholastic athletics because he refused to submit to the school's drug testing program. The Court ruled that the program was constitutional. There were drug problems in the school and student athletes have a reduced expectation of privacy.

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989). Drug testing of customs agents without individualized suspicion was reasonable because of the government's interest in preventing bribery and misuse of firearms. Because they were subject to fitness and character examinations, agents had a diminished expectation of privacy.

Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989). After balancing the government's need to search against the privacy rights of railroad employees, the court determined that drug testing without individualized suspicion was reasonable in cases involving accidents or issues of safety. Also, because of physical fitness requirements, employees had diminished expectations of privacy.

****

Joy v. Penn-Harris-Madison School Corporation, 212F.3d 1052 (7th Cir. 2000). Students at PHM High School claimed that the schools' random drug testing policy violated their 4th Amendment rights. A federal district court granted summary judgment for the school system. The 7th Circuit Court of Appeals upheld the lower court's decision ruling that: 1) random, suspicionless drug testing of students in extracurricular activities is legal; b) the school system demonstrated sufficient need to justify random drug and alcohol testing of these students but did not justify sufficient need to test for nicotine.

Miller *ex rel.* Miller v. Wilkes, 172 F3. 574 (8th Cir. 1999).
Cave City (Arkansas) Schools has a drug policy requiring that, to participate in extra-curricular school activities, students must give written consent to be drug tested by random selection. Miller refused to participate in the drug program by way of his guardian Troy Miller, but wanted to participate in extra-curricular activities. He sought injunctive relief. The 8th circuit court of appeals held the random drug testing program, reasonable under the 4th Amendment because: a) Cave City public school students involved in extra-curricular activities have a lessened expectation of privacy; b) the school district has an important and immediate interest in discouraging drug and alcohol use; and c) the minimal amount of intrusion is proportional and the district's interest

Willis v. Anderson Community School Corp., 158 F.3d 415 (7th Cir. 1998). The 7th circuit court of appeals held that it was unconstitutional for an Indiana school district to have a policy which required the drug testing of all students who are suspended regardless of the offense. The court distinguished this case from Todd v. Rush where students participating in extracurricular activities were tested. In Todd, unlike Willis, participation was voluntary. The Anderson School District's policy required drug and alcohol testing of students who possess or use tobacco, are truant, or are suspended for three days or more.

Todd v. Rush County Schools, 133 F.3d 984 (7th Cir. 1998). Parents brought suit against the Rush County Schools claiming the district's program which required random urine testing for drugs, alcohol, and cigarettes of all high school students wanting to participate in extracurricular activities violated students' Fourth Amendment rights. Citing Vernonia, the court held the drug testing as reasonable.

Schaill v. Tippecanoe County School Corp., 864 F.2d 1309 (7th Cir. 1988).
Random urine testing of student athletes was considered to be a reasonable search because of the school's interest in preventing drug-related injuries, because student athletes are role models for other school students, and because the intrusion into privacy is lessened in light of other physical examinations required of student athletes.

****

Brooks v. East Chambers Consolidated School District, 730 F. Supp. 759 (S.D. Tex. 1989). The court granted a permanent injunction in the case of a student athlete who was expected to submit to urine testing based on a school policy requiring this test for all students who participate in extracurricular activities. The policy had been passed in light of a general societal problem, but this particular school district had not had such problems. Because there was no compelling need for the search and the search was unlikely to accomplish its objectives, the court deemed the search to be unreasonable.

Anable v. Ford, 663 F. Supp. 149 (W.D. Ark. 1985). The court ruled that urine testing of high school students for marijuana was unreasonable. There were doubts as to the reliability of the tests and visual monitoring of the students urinating was considered to be excessively intrusive.

****

Trinidad School District No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998). Carlos Lopez, a senior band member, brought suit against Trinidad School District claiming that the school's drug testing policy which required all students in grades 6-12 participating in extracurricular activities to submit to random drug testing was unconstitutional. Citing Vernonia, Colorado's Supreme Court held that the policy was not legal because, unlike athletic teams, participation in the band was not wholly voluntary and there was a qualitative difference in the communal undress exhibited by band members as opposed to athletes. This decision represents a departure from the seventh circuit's decision in Todd v. Rush which upheld a similar policy and from the recent U.S. Supreme Court decision in Earls.

Odenheim v. Carlstadt-East Rutherford Regional School Dist., 510 A.2d 709 (NJ Super 1985). A New Jersey superior court ruled that mandated urine testing (for drugs and alcohol) of all high school students as part of their annual physical examination constituted a search under the Fourth Amendment and was unreasonable because it was a violation of students' privacy rights. Such massive searches were also considered to be unjustified in light of the numbers and percentages of students in the school with drug and alcohol problems.

METAL DETECTOR SEARCHES

In re F.B., 658 A. 2d 1378 (Pa. Super. Ct. 1995), *aff'd* 726 A.2d 361 (Pa. 1999). F.B. was subjected to a point of entry search upon entering University High School in Philadelphia, Pa. Parents and students are informed at the beginning of the year that such searches will occur and postings are made throughout the year. All students were required to stand in line while their packs and coats are searched. The students were searched by a hand held metal detector. The officers were acting under direction of school officials. F.B. emptied his pockets during the search. He was found carrying a Swiss Army knife with a three inch blade and was arrested. The court held that there was no 4th Amendment violation because the search affected a limited privacy interest, was minimally intrusive, notice of the search was provided to the student population, and the purpose of the search was compelling. No finding of individualized suspicion was necessary because the search was conducted on all students. Evidence should not be suppressed.

People v. Latasha W., 70 Cal. Rptr. 2d 886 (Cal. Ct. App. 1998). The Los Angeles Unified School District has a written policy allowing daily random searches with hand-held metal detectors. School officials may conduct these searches provided they use some sort of neutral criteria in determining who to search. In this case, the assistant principal searched students who were at least 30 minutes late for school and entered the attendance office without a pass. The metal detector beeped on Latasha who was asked to open her pocket. A knife was found. The court cited other states' decisions on metal detector searching as well as the Vernonia opinion in ruling that the search was legal and that individualized suspicion was not required.

In the Interest of S.S., 680 A. 2d 1172 (Pa. Super. 1996). During a student-wide metal detector search at a Philadelphia high school, a student was asked place his coat on a table. The school officer scanned the coat and then patted it down. A box cutter was found in the coat pocket. The court noted that individualized suspicion was not needed since this was an administrative search conducted for the purpose of ensuring safety. Also, due to the high rate of violence in the Philadelphia schools, the search was justified and deemed reasonable. Therefore, the search did not violate the Fourth Amendment.

People v. Pruitt, 662 N.E.2d 540 (Ill. 1996). There were three separate incidents that occurred at three different Chicago public schools. 1) When S. Pruitt walked through a metal detector, the police assigned to the school were alerted that he may possess a metal object. The officers conducted a pat-down and felt a bulge in his pocket. A gun was found on his person. The court determined that the school's metal detector searches were suspicionless, administrative searches conducted as part of a general regulatory scheme to ensure safely. The interest in protecting students from violence outweighed the student's privacy interests which were minimal. Thus, individualized suspicion was not required and the search did not violate Pruitt's Fourth Amendment rights. 2) An officer assigned to the school was informed by security of a student statement which mentioned J. Cheatam had a weapon. The officer had Cheatam brought to the school office and asked if there were anything in his possession that could get him into trouble. Cheatam pointed to his coat pocket and when asked what it was, he told the officer it was a gun. The officer then removed the gun from Cheatam's pocket. The court believed that the informant tip from another student created a reasonable suspicion that justified the intrusion. 3) A teacher notified the school dean of a stranger in the school who was acting suspicious and walking on a staircase that was prohibited for students. The dean confronted the student, Brooks, and took him to an office. After questioning, it was determined that Brooks was in fact a student at the school and not a stranger. After approximately sixty minutes in the office, the dean ordered Brooks to empty his pockets. In finding the search violative of the Fourth Amendment, the court stated that the dean's knowledge that Brooks was a student and the passage of sixty minutes changed the set of circumstances that would have lead to reasonable suspicion. The request for Brooks to empty his pockets was an unparticularized suspicion and was unreasonable.

State v. J.A., 679 So. 2d 316 (Fla. App. 1996). An independent security firm was hired by the school board to conduct searches of district schools with a hand held metal detector. A team arrived at a Florida secondary school class and noticed a jacket being passed to the back of the room. The team retrieved the jacket, scanned it, and found a gun. J.A. was identified as the jacket's owner. The court identified this search as a random, suspicionless, administrative search to further the purpose of keeping schools safe. The nature of search was considered a minimal intrusion and the interest of protecting schools from weapons and violence was immediate. Hence, the search was reasonable and not in violation of the Fourth Amendment.

People v. Dukes, 580 N.Y.S.2d 850 (N.Y. City Crim. Ct. 1992). A New York court ruled that a student's rights were not violated when she was subjected to a metal detector search without individualized suspicion. The metal detector search resulted in a search of the student's book bag whereupon a knife was found.

RANDOM LOCKER SEARCHES

In re Patrick Y., 746 A.2d 405 (Md. 2000). A school security guard at Mark Twain School received a tip that drugs and/or weapons were in the middle school area. The principal authorized a middle school wide locker search. A knife and rolling papers were found in the locker of Patrick Y., an eighth grade student. Citing the school officials' need to keep the school safe, the Court of Special Appeals of Maryland affirmed the lower court's determination that the search was legal. The court found that the search of lockers was justified because of the report that drugs and/or weapons may be in the school. Maryland's Sate Supreme

Court uheld these decisions, determining that a student has a lower expectation of privacy regarding his/her locker and that a locker search is not seriously intrusive as it is not an intrusion on the person.

Commonwealth v. Cass, 709 A.2d 350 (Pa. 1998). After observing numerous occurrences of what appeared to be suspicious student behavior (frequent phone calls, use of beepers, and carrying large sums of money), administrators at Harborcreek High School in Erie County, requested the state police to conduct canine sniffing of student lockers. Drugs were found in only one of the 2,000 lockers searched. Drug paraphernalia and a small amount of marijuana was seized. The student was called to the principal's office and read his rights. Overturning a state superior court decision, Pa.'s Supreme Court maintained that this search was reasonable under the federal constitution and Article 1, §8 of the Pa. Constitution. The court pointed out the danger of drugs and students' limited privacy in schools as a basis for its decision.

In re Isiah B., 500 N.W.2d 637 (Wis. 1993). As the result of a random search of student lockers, a gun and cocaine were found in Isiah B's coat pocket. Wisconsin's Supreme Court held this search as reasonable because lockers are school property as defined in the student handbook, student locks are not permitted on the lockers, and there was a risk of imminent, serious harm to students and staff.

FIELD TRIP SEARCHES

Webb v. McCullough, 828 F.2d 1151 (6th Cir. 1987). On a trip to Hawaii of 140 students, a principal's search of student rooms for alcohol and without individualized suspicion was unreasonable.

****

Rhodes v. Guarricino, 54 F. Supp. 2d 186 (S.D.N.Y. 1999). Students were on a class trip at Disney World. They had been notified that they would be subjected to room checks and were required to sign a pledge that they would not use drugs or alcohol. Guarricino, a chaperon, smelled marijuana. He was informed that the hotel allowed chaperons in the rooms of student groups. He searched some twenty rooms while the students were not there. The search uncovered marijuana and alcohol in Rhodes' room. Rhodes sued for §1983 damages. Applying the *Vernonia* standard to school sponsored trips, the court held that there was more individualized suspicion than in *Vernonia*. Also, even if it were established that Guarricino violated Rhodes' 4th Amendment rights, he would be entitled to qualified immunity.

Desilets v. Clearview Regional Bd. of Educ., 627 A.2d 667 (N.J.Super 1993). A New Jersey school had a policy of inspecting handheld luggage prior to field trips. These searches were held reasonable in that advance notice was given.

Kuehn v. Renton School Dist. No. 403, 694 P.2d 1078 (Wash. 1985). Mass searches of students' luggage prior to a field trip were unreasonable because they lacked individualized suspicion.

OTHER SEARCHES CONDUCTED WITHOUT INDIVIDUALIZED SUSPICION

DesRoches *ex rel.* DesRoches v. Caprio, 974 F. Supp. 542 (E.D. Va. 1997), 156 F.3d 571 (4th Cir. 1998). A female classmate noticed that the tennis shoes she had left on her desk were missing. James Lee, Dean of Students conducted a search of the entire class. DesRoches, a 9th grader, objected to the search. He was suspended for refusing to submit his bag to be searched. The court held that the search was reasonable because after the search of the other students turned up nothing, the proposed search of DesRoches' pack was based on individualized suspicion.

Smith v. McGlothin, 119 F.3d 786 (9th Cir. 1997). A school security guard at Orange Glen High School in Escondido, California, received complaints from neighbors that students were smoking near the school. When the guard and Vice Principal McGlothlin arrived at the area, they saw smoke and some 20 students but could not tell which students in the group were actually smoking. They brought the students back to the school and searched them. Beth Ann Smith was found with three knives. School authorities turned her over to the police and a juvenile court judge suppressed the evidence and dismissed the charges. Smith brought action under §1983 claiming that the search was conducted in an unreasonable manner because students were not asked who was smoking, there was a two-hour delay in searching the students, and there was no individualized suspicion. A federal district court dismissed the case on grounds of qualified immunity. The ninth circuit court ruled that Smith's reasons supporting an unreasonable search were not valid and, hence, McGlothlin was not liable under §1983. The ninth circuit court cited Vernonia and Alexander B., a California case, as precedent for conducting reasonable searches without individualized suspicion.

Thompson v. Carthage School District, 87 F.3d 979 (8th Cir. 1996). A bus driver saw fresh cuts on a school bus seat and reported them to the principal of Carthage High School in Arkansas. Upon hearing this news, the principal decided to search all boys in grades 6-12. After the search began, students told the principal that there was a gun at school that morning. Students were told to remove their jackets, shoes, and socks, empty their pockets, and place these items on a large table. Students were then searched with a metal detector and patted down if the detectors sounded. Thompson was searched and cocaine was found in the match box he had in his jacket pocket. Even though there had been no individualized suspicion, the search was upheld. The court cited Vernonia to justify the lack of individualized suspicion.

****

In Re: Adam (Ohio App. 1997) (No. 96-L-138). A teacher noticed two students attempting to leave the building and later observed them smoking a substance that smelled like marijuana. The students denied smoking marijuana. The incident was reported to the principal. The students were called into the office and told to empty their pockets. Nothing was found. Believing that he smelled marijuana on the students' clothes, the principal proceeded to search their lockers and the backpacks inside the lockers. A pipe with marijuana residue was found. The court declared the search as "clearly" reasonable and not a violation of the students' rights. Once the student was found smoking, he placed himself in a zone of inquiry which opened the possibility of searches for marijuana. However, the court found a school policy which allowed for the "random" search of lockers to be unconstitutional because the randomness provided for a blanket search which was per se unreasonable.

In re Alexander B., 270 Cal.Rptr. 342 (Cal.Ct.App.1990). A California court ruled that a search of a group of five or six students was reasonable when one unidentified student in the group yelled that someone has a gun. The search was by a police officer and there was exigency.

RESURRECTION OF THE ELEVENTH AMENDMENT: ARE THE RIGHTS OF SPECIAL EDUCATION STUDENTS IN JEOPARDY

Christine J. Villani, Ed.D.
Southern Connecticut State University
Department of Educational Leadership
501 Crescent Street, Wintergreen 151
New Haven, CT 06515
Associate Professor of Educational Leadership
Phone 203-392-5343
Fax 203-392-5347
e-mail villani@scsu.stateu.edu

Cynthia A. Dieterich, Ph.D.
Cleveland State University
Rhodes Tower 1334
1860 East 22nd Street
Cleveland, Ohio 44114
Phone 216-523-7103
Fax 216 687-5379
e-mail c.dieterich@csuohio.edu

B. Darren Burns, J.D.
Reese and Carney, LLP
170 Jennifer Road, Ste. 245
Annapolis, MD 21401
Phone 410-573-2001
Fax 410-573-1171
e-mail BDB@reese-carney.com

RESURRECTION OF THE ELEVENTH AMENDMENT: ARE THE RIGHTS OF SPECIAL EDUCATION STUDENTS IN JEOPARDY

I. Historical Context of the Eleventh Amendment

Amendment XI, Constitution of the United States:

> **The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens of Subjects of any Foreign State.**

A. Background

The Eleventh Amendment, ratified by the States in 1798, has proven itself a great source of discussion, even confusion, among the various courts of the country. It came into existence in response to a case that prompted Congress to ask: What rights did the several states retain, or refuse to relinquish, after joining the United States under the Constitution? Could they be taken into federal court and subjected to damages? Some have suggested that Congress deliberately drafted ambiguity into the Amendment due to the lack of consensus on the answers to these questions. This is not surprising, given the considerable debate in which the Framers had engaged over how far to extend the power of the federal judiciary.[1] Ever since, while the text of the amendment has remained unchanged, it has been a malleable proclamation for the judiciary to attempt to shape, explain, and apply.

It started in 1793, when the Supreme Court held that Article III of the Constitution permitted a private citizen of another state to sue Georgia without its consent in *Chisholm v. Georgia*.[2] As a result, during the first meeting of Congress following this case, the Eleventh Amendment was proposed and ratified to essentially overturn *Chisholm*. Thus, the States retained their sovereign immunity and could not be brought before a federal court without their consent.

Over time the court grappled with the Amendment as noted in *Hans v. Louisiana*,[3] holding that it did intend to bar a citizen from suing his own State in federal court, unless that State had consented. Thus, said the Court, a State could not be sued by citizens of others States or citizens of that State on grounds arising under federal laws.[4] This had the practical effect of expanding the Amendment's influence as a bar to litigation beyond just jurisdiction cases to those involving all sorts of federal questions.[5]

---

[1] A concise, but informative discussion of this historical context is provided near the beginning of Justice Rehnquist's opinion in *Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974).

[2] 2 Dall. 419 1793).

[3] 134 U.S. 1, 10 S.Ct 504, 33 L.Ed 842 (1890).

[4] *Id.* at 15.

Over the years, the courts have recognized three key exceptions to such immunity. First, citizens may sue a State official in federal court for injunctive relief from federal law or constitutional violations during the course of his official duties.[6] Second, a State may consent to suit by waiver. The standard for such waiver has become rather strict. As the U.S. District Court in Maryland confirmed, a State may waive its Eleventh Amendment immunity only by the "the most express language or by such overwhelming implications from the text [of the State statue] as will leave no room for any other reasonable construction."[7] Indeed, one type of waiver, constructive consent, recognized in *Parden* has since been overruled.[8] A third way to abrogate Eleventh Amendment immunity occurs under Congress' power to enforce the Fourteenth Amendment guarantees of equal protection of the laws and due process of law.[9] In particular, this third venue to avoid the bar against suing States has undergone recent refinements by the courts, with some of the most notable decisions issued in the past six years. For instance, up until 1996, it was generally accepted that Congress could simple abrogate the States' Eleventh Amendment immunity via its power derived from the Commerce Clause.[10] Even though Congress passed laws to enforce the post-Civil War Amendments (Thirteenth, Fourteenth, and Fifteenth),[11] generally it had relied on the power of the Commerce Clause.

However, in *Seminole Tribe of Florida v. Florida*,[12] the Court held that Congress' powers under Article I of the Constitution do not include the power to subject States to suit at the hand of private individuals. Thus, only the Post-Civil War "remedial" powers of Congress could be invoked to abrogate the States' Eleventh Amendment immunity and not the Commerce Clause. Remedial measures are those applied by Congress when States violate the Fourteenth Amendment.[13] In order for the federal government to intervene with remedial action, lawmakers must make a specific finding that the State or state agency has demonstrated a pattern of a particular civil rights violation. In *Seminole Tribe*, the Court found that Congress failed to do this in enacting the Indian Gaming Regulatory Act.[14] Further, the remedial measure(s) Congress employs must be "congruent" and "proportional" between the injury to be prevented or remedied and the means adopted to achieve that end.[15]

---

[5] *See Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 54,116 S.Ct. 1114, 134 L.Ed.2d 252 (1996).

[6] *See Ex Parte Young*, 209 U.S. 123 (1908).

[7] *Jones v. Frederick County Board of Education*, 689 F.Supp.535 (1988) citing *Edelman v. Jordan*, supra, 415 U.S. at 673 (1974).

[8] *See College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board*, 527 U.S. 666, 119 S. Ct. 2199, 144 L.Ed.2d 605 (1999).

[9] *See Fitzpatrck v. Bitzer*, 427 U.S. 445 (1976).

[10] Article 1, Section 8 of the Constitution provides that Congress has the power "to regulate Commerce with foreign Nations, and among the several states, and with the Indian Tribes." This power has been deemed not only a source of congressional authority, but also a limitation on state power.

[11] In the wake of the Civil War, Congress enacted the Thirteenth, Fourteenth, and Fifteenth Amendments to incorporate an individual's constitutional rights to the states—freedom from slavery, freedom from infringements on life, liberty, and property without due process of law, and freedom to vote. With each of these Amendments came the power of Congress to enforce them against the states.

[12] *Supra* note 5.

[13] "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." Amendment XIV.

In 1999, the Supreme Court issued opinions in two cases that further limited the application of federal law to the States. In *Alden v. Maine,*[16] the Court held that not only is a State immune from suit in federal court, but it is also immune in state court. *Alden* struck down Congress' authority to confer a right of action on State workers under the Fair Labor Standards Act (FLSA) in State courts. The reasoning behind this was that the State's immunity from private suits for money damages in its own courts was a "fundamental aspect of the sovereignty which the states enjoyed before the ratification of the Constitution, and which they retain today."[17] The companion cases to *Alden* were *Fla. Prepaid Postsecondary Edu. Expense Board v. College Savings Bank*[18] and *College Savings Bank v. Florida Prepaid Postsecondary Educ. Expense Board.*[19] The latter by eliminating the "constructive" waiver that had been permitted under *Parden v.Terminal Railroad Company*[20] made it clear that a State can waive its Eleventh Amendment immunity only by an "unequivocal expression" and " clear declaration." Thus, the threshold to meet in order to bring the State before a federal court is very high.

More recently in *Kimel v. Florida Board of Regents,*[21] two associate professors, from the University of Montevallo in Alabama, held that they were discriminated against based on age with regard to evaluations and pay raises. In a related case, a group of current and former faculty and librarians from Florida State University including J. Daniel Kimel, Jr. argued that the Florida Board of Regents refused to require the state universities to allocate funds for previously agreed upon market adjustments to salaries of eligible university employers. Additionally, W. Dickson filed suit against the Florida Department of Corrections alleging that the state employer failed to promote him because of his age. Plaintiffs in all three cases appealed the decision of the lower court to the Court of Appeals for the Eleventh Circuit who held that the ADEA does not abrogate the State's Eleventh Amendment immunity.

Upon review by the United States Supreme Court, it was found that "although the ADEA does contain a clear statement of Congress' intent to abrogate the States' immunity, that abrogation exceeded

---

[14] *Supra* note 5.

[15] *City of Boerne v. Flores*, 521 U.S. 507, 531, 117 S.Ct. 2157, 138 L.Ed. 2d 624 (1997). Holding that Religious Freedom Restoration Act of 1993 (RFRA) was not appropriate legislation under the Fourteenth Amendment because (a) there was only anecdotal evidence and it did not reveal a widespread pattern of religious discrimination in the country, and (b) the RFRA was far out of proportion to the supposed remedial or preventive object.

[16] 527 U.S. 706, 119 S.Ct. 1138, 144 L.Ed.2d 636 (1999).

[17] At least one federal court has observed that the phrase, "Eleventh Amendment immunity" is "convenient shorthand but something of a misnomer" as sovereign immunity was enjoyed by States before the Constitution's ratification. *See Breen v. Texas A&M Univ.,* 213 F.Supp.2d 766 (S.D. Tex. 2002), citing *Alden,supra* note at 17.

[18] 527 U.S. 627, 119 S.Ct. 2199, 144 L.Ed. 2d 575 (1999).

[19] *Supra* note at 9. Federal patent and trademark acts failed to abrogate immunity.

[20] *Supra* note at 7.

[21] 528 U.S. 62, 120 S.Ct. 631, 145 L.Ed.2d 522 (2000).

Congress' authority under section 5 of the Fourteenth Amendment."[22] In addition, Section 5 of the Fourteenth Amendment grants Congress the power to enforce substantive guarantees contained in section 1 by enhancing "appropriate legislations."[23] Of particular note is the court's position that the decision was not the end of the line for employees who find themselves subject to age discrimination and may recover money damages from their state employers in almost every State.

In *United States v. Morrison* [24] the Supreme Court held that the Violence Against Women Act,[25] could not be sustained under the Commerce Clause of the Fourteenth Amendment. In this case Antonio Morrison and James Crawford raped Christy Brzonkla who was enrolled at the Virginia Polytechnic Institute. This led to her becoming severely emotionally disturbed and depressed. She filed a complaint against the respondents based on the school's sexual assault policy. The Virginia Tech's Judicial Committee did not find sufficient evidence to punish Crawford, but Morrison who admitted to having sex with Brzonkla, despite her saying no twice, was suspended for two semesters. Morrison initiated a court challenge and the school conducted a second hearing where a second committee found him guilty, but changed the description of his offense from "sexual assault" to "using abusive language." Morrison appealed this second decision to the administrative system that set aside his punishment.

Brzonkla sued Morrison, Crawford, and Virginia Tech in the United States District Court citing section 13981 of the Violence Against Women Act[26]and Title IX[27] of the Education Amendment. Morrison and Crawford sought to dismiss the complaint on the grounds that it failed to state a claim and civil remedy was unconstitutional. The United States intervened. The District Court dismissed the claim and concluded that Congress lacked the authority to enact section 13981 under either the Commerce Clause or section 5 of the Fourteenth Amendment.[28] A divided panel of the Court Appeals reversed the District Court.[29] The Supreme Court reversed saying that Section 13981 cannot be sustained under the Commerce Clause or section 5 of the Fourteenth Amendment.[30] The Court stated that gender-motivated crimes of violence are not, economic activity and additionally noted that Congress invoked the Fourteenth Amendment as a source of activity to enact section 13981.

In *Garret v. University of Alabama at Birmingham Board of Trustees,*[31] a petitioner sued the state under the Americans with Disabilities Act (ADA)[32]. Facts of this case reveal that Patricia Garrett, a registered nurse, was the Director of Nursing, OB/GYN/Neonatal Services for the University of Alabama in Birmingham Hospital. In 1994, she was diagnosed with breast cancer underwent a lumpectomy, radiation, and chemotherapy. Having to take substantial time off work she returned in July 1995 and was required to give up her Director position. Garrett applied for a transfer and received a lower paying job as a nurse manager.[33]

---

[22] *Id.*
[23] *See City of Boerne v. Flores*, 521 U.S. 507, 536 (1997).
[24] 529 U.S. 598; 120 S. Ct. 1740; 146 L. Ed. 2d 658 (2000).
[25] 42 U. S. C. §13981(b)
[26] *Id.*
[27] 86 Stat. 373-375, 20 U.S.C. §§1681-1688.
[28] 935 F. Supp. 779; 1996 U.S. Dist. LEXIS 10766.
[29] 169 F.3d 820; 1999 U.S. App. LEXIS 3457
[30] 529 U.S 598,120 S.Ct. 1740 (2002).
[31] 531 U.S. 356; 121 S.Ct. 955; 148 L.Ed.2d 866 (2001).
[32] 42 U.S.C.§12112(a).

In addition to Garret, Milton Ash, also of Alabama, brought a suit related to his disability. Ash worked as a security officer for the Alabama Department of Youth Services. He informed the Department that he suffered from chronic asthma and that his doctor recommended he avoid carbon monoxide and cigarette smoke. He requested that the Department modify his duties to minimize his exposure to these substances. Ash was later diagnosed with sleep apnea and requested based on his doctor's recommendation, that he be reassigned to the day shift. The Department granted neither of the requests. Ash then filed a discrimination claim with the Equal Opportunity Commission.

Garret and Ash filed separate lawsuits in District Court seeking monetary damages under the ADA. The District Court disposed of both cases by granting summary judgment claiming that the ADA exceeds Congress' authority to abrogate the Eleventh Amendment immunity. The cases were consolidated and on appeal the Eleventh Circuit reversed the lower court decision. The U.S. Supreme Court granted certiorari to resolve a split among the Court of Appeals question as to whether an individual may sue a State for money damages in federal court under the ADA.[34]

In its opinion, the Supreme Court held that state employees who brought lawsuits in federal court to recover monetary damages by reason of the State's failure to comply with Title I of the ADA are prohibited by the Eleventh Amendment. These recent decisions by the Supreme Court make it clear that section 5 of the fourteenth amendment cannot be used to abrogate the eleventh amendment. It appears that a person's right to sue a state has been diminished by these recent decisions. The Court has diminished federal powers and increased state powers, but in doing so has diminished individual civil rights. A political and moral issue is now at the forefront. Are the enumerated powers of Congress under the Fourteenth Amendment and the Commerce Clause diminished? Does this endanger Title II, ADA and Section 504, and IDEA or other legislation related to race, religious, and sex discrimination?

B. Are School Districts State Agencies to Which Eleventh Amendment Immunity Extends?

Although language of the Eleventh Amendment preserves the sovereign immunity of the "States," it is settled that this protection extends also to State agents, State instrumentalities, regents[35] or "arms of the State" and State officials.[36] However, this extension does not reach to counties and municipalities, even those that exercise a "slice of state power."[37] Consequently, there are also county school districts, in some States, which do not enjoy such immunity.[38] Thus, a threshold question in any case in which the school district raises an Eleventh Amendment immunity defense, is whether that particular board of education is to be treated as an arm of the state or, instead, as a local or municipal agency. The question will usually turn on the application of state law governing the classification of governmental entities.

---

[33] *Id.*

[34] *Id.*.

[35] 519 U.S. at 429.

[36] *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977).

[37] *Id.* at 280,

Some factors have emerged to determine this question. For example, in 1988, the federal District Court in Maryland concluded unequivocally that a county board of education was an agent of the State and was therefore immune from suit in federal court under the Eleventh Amendment.[39] This was despite the acknowledgment that the boards in that State are, from a budgetary and structural perspective, local in character.[40]

In reaching its conclusion in *Jones*, the Court considered several factors to determine whether the local board was an agency of the State for immunity purposes including 1) state statutes and court decisions governing the local board; 2) the board's source of revenue; 3) the board's autonomy from the state government; 4) whether the board has the power to sue and be sued; 5) whether the board has the power to contract; and 6) whether the State would be responsible for a judgment against the entity.[41]

The Ninth Circuit considered the same issue in *Belanger v. Madera Unified School District*[42] and while that Court emphasized California's unusually close ties between the State and the local school districts, the points of analysis were essentially the same as in the Maryland case: (a) whether monetary judgment would be satisfied out of state funds; (b) whether the entity performs central governmental functions; (c) whether the entity may sue and be sued; (d) whether the entity has the power to take property in its own name or only in the name of the state; and (e) whether the entity has corporate status.

---

[38] *See*, *Cash v. Granville County*, 242 F.3d 219 (4th Cir. 2001) Local school board, deemed "more like a county than an arm of the State" under North Carolina law, held not immune.

[39] *Jones v. Frederick*, 689 F.Supp. 535 (D.Md. 1988).

[40] *Chesapeake Charter, Inc. v. Anne Arundel County Board of Education*, 358 Md. 129, 136-139, 747 A.2d 625, 629 (2000). In Maryland, county school boards are considered generally to be state agencies because, among other reasons, the public school system in that state is a comprehensive state-wide system pursuant to the State Constitution's establishment throughout the state of a thorough and efficient system of free public schools; the fact that the entity locally carries out the state education policy and not the county government, and the local school boards are subject to extensive supervision by the State Board of Education in virtually every aspect of their operation that effects educational policy or the administration of the public schools in the county.

[41] *Id.*, at 537. *See Biggs v. Board of Education of Cecil County*, 2002 WL 371095 (March, 2002). Local board of education held immune from suit by disabled student for money damages under the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act) citing Board of Trustees of the Univ. of Alabama, et al. V. Garrett, 531 U.S. 356, 121 S.Ct. 955, 148 L.Ed.2d 866 (2001). As discussed above, however, the State has the power to consent to suit and waive its immunity under the Eleventh Amendment. Maryland, like other States, has enacted laws that effectuate a partial such waiver. *See, e.g.*, Md. Code Ann., *Courts and Judicial Proceedings Article*, Section 5-518: "A county board of education, described under Title 4, Subtitle 1 of the Education Article, may raise the defense of sovereign immunity to any amount claimed above the limit of its insurance policy ... A county board of education may not raise the defense of sovereign immunity to any claim $100,000 or less." This means that a board can be liable for an amount of damages up to its insurance policy limits, $100,000 according to statute. However, the State and its officers and units are not liable for punitive damages.

[42] 963 F.2d 248 (9th Circ. 1992)

BEST COPY AVAILABLE

In *Breen v. Texas A&M University*,[43] the District Court found that Texas had not consented to a suit in federal court by individuals regarding the 1999 Bonfire collapse at Texas A&M University, nor had the State's sovereign immunity been abrogated or compromised by Congress with the passage of Section 1983. Accordingly, it ruled that the University was shielded from liability by its Eleventh Amendment immunity.[44] On the other hand, in *Cash v. Granville*,[45] the Fourth Circuit denied sovereign immunity for a North Carolina school district. Noting that such immunity derives from the original sovereignty of the State, not necessarily from the Eleventh Amendment – which "confirmed rather than established sovereign immunity as a Constitutional principle" – the Court observed that the "state treasury factor" is the "most salient factor in Eleventh Amendment determinations."[46]

C. Will School Districts Treated as State Agencies Be Immune to Lawsuits Under IDEA or Section 504?

In enacting IDEA did Congress demonstrate a "widespread pattern" of discrimination against students with disabilities?[47] Are the remedies provided for in IDEA or Section 504 congruent to and proportionate with the injury to be redressed or prevented?

In a case out of Arkansas, the Eight Circuit "reviewed the legislative history" at the time Congress passed IDEA, and found that "did not adequately identify the constitutional transgressions it sought to remedy when it enacted IDEA."[48] Moreover, to the extent Congress made factual findings about disabled students, it "did not find that the disparate treatment of [them] resulted from action by the states or, if it did, that such state action violated the Equal Protection Clause."[49]

Beyond these findings, the Court of Appeals also held that "IDEA's [Eleventh Amendment immunity] abrogation provision is invalid because IDEA is not an appropriate exercise of Congress'

---

[43] 213 F.Supp.2d 766 (S.D. Tex. 2002).

[44] Previous decisions of the Fifth Circuit and district courts in Texas have consistently afforded Eleventh Amendment immunity to state universities, including Texas A&M. *See also, Hill v. Board of Trustees of Michigan State University*, 182 F.Supp.2d 621 (2001)(as an "arm of state," school immune from suit for damages or injunctive relief); *Hamilton v. City College of the City University of New York*, 173 F.Supp.2d 181, 184-85 (S.D.N.Y. 2001)(colleges of the CUNY system and their officials enjoy the State of New York's Eleventh Amendment immunity), citing *Garcia v. S.U.N.Y. Health Sciences Center of Brooklyn*, No. 00-9223, 2001 WL 1159970 (2d Cir. Sept. 26, 2001).

[45] 242 F.3d 219 (2001).

[46] *Id., at 225*, citing *Regents of the University of California v. Doe*, 519 U.S. 425, 429 (1997) and *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977). No immunity for local board because, under Ohio law, "State" does not include political subdivisions, but political subdivisions do include school districts.

[47] *Supra* note 25 at 645.

[48] *Bradley v. Arkansas Department of Education*, 189 F.3d 745, (8th Cir. 1999), *rev. on other grounds sub nom. Jim C. v. United States*, 235 F.3d 1079, 1080 (8th Cir. 2000) (en banc), *cert. denied Arkansas Dept. of Education v. Jim C.*, 533 U.S. 949 (2001).

[49] *Id* at 751-52.

Section 5 power."[50] Notwithstanding its ruling on the abrogation issue, the Eight Circuit held that Arkansas still waived its immunity, as to the entire Department of Education (not just those specifically supported by statutory funds) when it chose to participate in federal spending programs created by IDEA[51] and accepted Section 504 federal funds.[52] At the same time, IDEA does not provide for compensatory or punitive damages, and a violation does not entitle a plaintiff to sue under Section 1983.[53] The purpose of IDEA and its procedural mechanisms is to promote free appropriate public education, "not to provide a forum for tort-like claims of educational malpractice."[54]

II. Conclusion

When the several States joined the United States by ratifying the Constitution, they retained certain rights.[55] While there has been heated debate (to say the least) about what those rights are, the Eleventh Amendment and the cases interpreting it solidified the States' immunity from federal suit unless one of the three exceptions applies. In some jurisdictions, local boards of education are state agencies for Eleventh Amendment purposes, but may still be amenable to suit under the exceptions. In others, the school districts are not considered state agencies, and, as such, they may be subject to suit in federal court. It remains to be seen how this split plays out, if at all, in the area of lawsuits brought for alleged violations of federal law governing special education and disabled students. And in the area of rights of students with disabilities, as with other federal law rights, will a different but obviously related Equal Protection issue arise from the fact that students and parents in the several States may have differing access to the federal courts, depending on the varying degrees of State "consent"?

---

[50] *Id.* at 752, citing the ADA abrogation analysis in *Alsbrook v. City of Maumelle*, 184 F.3d 999, 1008-09 (8th Cir. 1999).

[51] *Id.* at 753.

[52] *Jim C. v. United States* 235 F.3d 1079, 1080 (8th Cir. 2000) *See also, A.W. v. Jersey City Public Schools*, 2002 WL 1065685 (D.N.J. No. 01-CV-140, March 27, 2002) State and local school districts and officials denied sovereign immunity on ground they accepted federal funds. The two-prong test for abrogation of state immunity established by *Seminole Tribe* was applied in *A.W. v. Jersey City Public Schools, supra*. The district court found that the first prong had been met simply by looking to the plain language of the IDEA. However, the Court avoided addressing the second prong, instead ruling that it did not have reach that issue because the State had waived its immunity anyway by participating in the federal spending programs. *John T. v. Iowa Dep't. of Education*, 258 F.3d 860, 864 (8th Cir. 2001); *Board of Educ. of Oak Park and River Forest High School District No. 200 v. Illinois State Board of Education*, 207 3d 931(2000).

[53] *Sellers v. School Board of the City of Manassas, Virginia*, 142 L.Ed.2d 137 (1998).

[54] *Id.*

[55] U.S.C.A. Amendment X. "The powers not delegated to the United States by the Constitution, nor prohibited by the States, are reserved to the States respectively, or to the people."

Education Law Association 48th Annual Conference
New Orleans, Louisiana
November 14-16, 2002

"Due Process Rights in Public Education: The Constitutional Dimensions of an Employee's 14th Amendment Liberty Interest in Good Name and Reputation"

Presenters

Donald F. Uerling, J.D., Ph.D.
Associate Professor
Department of Educational Administration
University of Nebraska-Lincoln
Lincoln, NE 68588-0360

John L. Strope, Jr., J.D., Ph.D.
Professor
Department of Leadership, Foundations, and Human Resource Education
University of Louisville
Louisville, KY 40292

Introduction

This purpose of this paper is to explore the due process rights of public employees that are grounded in the constitutionally protected liberty interest in one's good name and reputation. Even though the scope of this constitutional protection is relatively narrow, a review of case law reveals that this liberty interest issue is often raised. Both employers and employees should be aware of what case law tells us about the dimensions of this due process right and how this liberty interest issue has been addressed in the context of public education.

In Board of Regents v. Roth, 408 U.S. 564 (1972), the Court held that the nonrenewal of a nontenured state university teacher's contract implicated no constitutionally protected liberty or property interest that would invoke the protects of procedural due process. But the Court noted that this would have been a "different case" had the State based the nonrenewal on a charge, such as dishonesty or immorality, that might seriously damage his standing and associations in the community or that had the State in declining to re-employ him imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. Had the State done so, a constitutionally protected liberty interest would have been implicated and the teacher would have been entitled to a hearing for the purpose of clearing his name. Id. at 573-74.

The Court explained further in subsequent cases the dimensions of this due process right. Statements by government officials that are damaging to reputation, when not inflicted in conjunction with some other governmental action that changes one's legal status, do not implicate any protected liberty interest. Paul v. Davis, 424 U.S. 693 (1976). To implicate a protected liberty interest in one's good name and reputation there must be public disclosure of the reasons for discharge. Bishop v. Wood, 426 U.S. 321 (1976). And, the employee must challenge the substantial truth of the allegations. Codd v. Velger, 429 U.S. 624 (1977).

The Court has established the parameters for the process due when a protected property interest is at stake. Those procedures should also be appropriate in instances when a protected liberty interest is implicated. "[A]ll the process that is due is provided by a pretermination opportunity to respond coupled with post-termination administrative [or judicial] proceedings . . . ." Cleveland Bd. of Educ. v. Laudermill, 470 U.S. 532, 547-48 (1985). In some instances,however, a hearing prior to the deprivation is not required. The purpose of this hearing is to assure that there are reasonable grounds to support the charge. For example, an "ex parte finding of probable cause," such as a grand jury indictment or an arrest and filing of charges, provides adequate assurance that a suspension without pay is not unjustified. Gilbert v. Homar, 520 U.S. 924 (1997).

What follows is a discussion of how issues pertinent to the liberty interests in good name and reputation have been resolved by the United States Courts of Appeal during the past 20 years.

Cause of Action

The elements of a cause of action for alleged violations of a plaintiff's liberty interests protected by the Due Process Clause vary somewhat, depending on the federal circuit. The outlines from five circuits serve to illustrate.

•To support a claim of a deprivation of a liberty interest, a plaintiff must show (1) that she has been stigmatized, (2) in or as a result of the "discharge" process, and (3) that the stigmatization resulted from charges made public by her employer. Upon this showing, the plaintiff is entitled to "a hearing to clear [her] name." Kelleher v. Flawn, 761 F.2d 1079 (5th Cir. 1985).

•To make out a claim for a deprivation of a liberty interest, plaintiff must show that: (1) he was stigmatized by the Board's conduct (I.e., that the Board defamed him); (2) the stigmatizing information was publicly disclosed; and (3) he suffered a tangible loss of other employment opportunities as a result of the public disclosure. Strasburger v. Board of Educ., 143 F.3d 351, 356 (7th Cir. 1998).

•To establish a liberty interest based on reputation, an employee must prove the following: (1) the defendant made a statement impugning the plaintiff's good name, reputation, honor, or integrity, in that the statement indicated dishonesty, immorality, criminality, and/or racism on the part of the plaintiff; (2) the statement was false; (3) the defendant made the statement in the course of termination proceedings or the statement foreclosed future employment opportunities; and (4) the statement was published. Winegar v. Des Moines Indep. Cmty. Sch. Dist., 20 F.3d 895 (8th Cir. 1984).

•The procedural protections of due process will apply if (1) the accuracy of the charge is contested, (2) there is some public disclosure of the charge, and (3) it is made in connection with a dismissal or alteration of some right or status recognized by state law. Llamas v. Butte Cmty. College Dist., 238 F.3d 1123 (9th Cir. 2001); Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773 (9th Cir. 1982).

•To show that defendants infringed a liberty interest, plaintiff must show several elements. First, the statements must impugn the good name, reputation, honor, or integrity of the employee. Second, the statements must be false. Third, the statements must occur in the course of terminating the employee or must foreclose other employment opportunities. And fourth, the statements must be published. Watson v. University of Utah Med. Ctr., 75 F.3d 569 (10th Cir. 1996).

"Stigma Plus"

Defamatory statements standing alone may serve as a bases for a state tort claim; they do not, however, constitute a deprivation of a constitutionally protected liberty interest. For a constitutional claim, the defamatory statements must be made in conjunction with some action that changes the plaintiff's employment status.

•Injury to reputation may be actionable under state defamation law, but defamation alone is not a deprivation of a liberty interest. Lancaster v. Independent Sch. Dist. No. 5, 149 F.3d 1228 (10th Cir. 1998); Vukadinovich v. Board of Sch. Trustees of Mich. City Area Schs., 978 F.2d 403 (7th Cir. 1992).

•A claim that defamatory statements were made in the course of terminating employment is often referred to as "stigma plus." See Vega v. Miller, 273 F.3d 460 (2nd Cir. 2001), cert. denied 122 S.Ct. 2295 (2002).

•The "reputation plus" standard requires that plaintiffs show that the government altered [their] status in a tangible way, and that an imposition of stigma or injury to reputation accompanied this change in status. Orange v. District of Columbia, 59 F.3d 1267 (D.C. Cir. 1995).

•Plaintiff must satisfy the stigma-plus test to maintain a cause of action for deprivation of a liberty interest. Hardiman v. Jefferson County Bd. of Educ., 709 F.2d (11th Cir. 1983).

•Stigma to reputation alone, absent some accompanying deprivation of present or future employment, is not a liberty interest protected by the fourteenth amendment. Edwards v. California Univ. of Penn., 156 F.3d 488 (3rd Cir. 1998), cert. denied 119 S.Ct. 1036.

•A biology teacher who resisted teaching evolution and shared his religious beliefs with students alleged that he had been reprimand by the principal, wrongly accused of teaching religion by local press, and harassed by other teachers. He contended that these defamatory statements damaged his reputation and thus violated his right to due process. His claim was rejected; allegations of injury to reputation, standing alone, are insufficient to support a claim for deprivation of a liberty interest. Peloza v. Capistrano Unified Sch. Dist., 37 F.3d 517 (9th Cir. 1994).

Defamation

Defamatory statements can take many forms. Some may serve as the basis for liberty interest claims, while others will not.

Charges of Dishonesty, Illegality, Immorality

•Allegation that a custodial worker was a thief was stigmatizing information that arose in connection with his discharge. Goetz v. Windsor Cent. Sch. Dist., 698 F.2d 606 (2nd Cir. 1983).

•A custodian was dismissed and barred from future employment based on allegations that he cheated in an interview process for a promotion by obtaining unauthorized access to a set of model answers. Had there been public disclosure of the charge, which he denied, those allegations would have implicated a protected liberty interest. Llama v. Butte Cmty. College Dist., 238 F.3d 1123 (9th Cir. 2001).

•A teacher was convicted of public intoxication and driving while intoxicated. Cancellation of a his contract for, among other things, "immorality (based on the conviction of violation of crimina! laws resulting in an interference with the educational purposes)" implicated a protected liberty interest. But derogatory comments made by school officials after his dismissal did not, because at that point he faced no further threat of dismissal. Vukadinovich v. Board of Sch. Trustees of Mich. City Area Schs., 978 F.2d 403 (7th Cir. 1992).

•A teacher's mid-year dismissal on grounds of immoral conduct would affect adversely his opportunities for future employment, thus imposing a stigma that entitled him to the protections of procedural due process. Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773 (9th Cir. 1982).

•Allegations of child abuse are sufficiently stigmatizing to a teacher's reputation, honor, and good name in the community so as to implicate protected liberty interests. Winegar v. Des Moines Indep. Cmty. Sch. Dist., 20 F.3d 895 (8th Cir. 1994), cert. denied, 513 U.S. 964 (1994).

•A nurse in a university hospital produced evidence that her supervisors made public statements to the entire nursing staff that not only she had "illegally" delivered a baby but also that she lied about the incident. These public charges certainly impugned her honesty and integrity. She also produced evidence that these charges were false and that she was placed on indefinite administrative leave without pay. Thus, she made a showing that she was entitled to notice and a hearing to clear her name. Watson v. University of Utah Med. Ctr., 75 F.3d 569 (10th Cir. 1996).

•The nonrenewal of a tenured teacher's contract on a charge of immorality implicated his liberty interest. The charge stemmed from an incident in the teachers lounge during which, in a heated argument with another teacher, he swore either at the teacher or at a piece of office equipment. Rankin v. Independent Sch. Dist. No. I-3, 876 F.2d 838 (10th Cir. 1989).

Charges of Unsatisfactory Performance

•Stigmatizing comments may include matters other than charges of illegality, dishonesty, or immorality. The test of whether an employer's decision not to rehire denies that employee due process is met when it deprives that employee of the freedom to take advantage of other employment opportunities. An employee charged with derelictions largely within his or her own power to correct is not deprived of such an interest.. By contrast, a government announcement that it has fired an employee for incompetence or because that employee can no longer do the job carries more potential for future disqualification from employe than a statement the individual performed a job poorly. Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623 (2nd Cir. 1996), cert. denied 519 U.S. 1150 (1997).

•The statement of reasons given for the dismissal of an assistant principal read like a bill of indictment, methodically reciting a litany of lack of professional competence. The accusations went to the heart of her professional competence and damaged her professional reputation to such an extent as to severely impede her ability to continue in the education field in a supervisory capacity. As a consequence, the defendant deprived plaintiff of a liberty interest. Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623 (2nd Cir. 1996), cert. denied 519 U.S. 1150 (1997).

•Simple charges of professional incompetence do not impose the sort of stigma that actually infringes an employee's liberty to pursue an occupation. Only if the circumstances so sully the employee's reputation or character that the employee will essentially be black-listed in his or her chosen profession will it be possible to pursue a due process liberty interest claim. Head v. Chicago Sch. Reform Bd. of Trustees, 225 F.3d 794 (7th Cir. 2000).

•A delivery person in a university purchasing department, who was an "at-will" employee, was dismissed for insubordination and poor performance. He claimed that he was deprived of a Fourteenth Amendment liberty interest in obtaining future employment by defendants in that they, by checking "no rehire" on his termination report, "blackballed" his future opportunities for employment. To prevail on this claim, plaintiff was required to prove that there was a publication of a defamatory statement that would tend to jeopardize employment opportunities. Charges of insubordination or poor work habits are not considered to be stigmatizing. Walker v. Elbert, 75 F.3d 592 (10th Cir. 1996).

•Teacher competencies (such as teaching performance and interpersonal relationships in the community) are not matters of constitutional dimensions; a statement that simply alleges conduct that fails to meet professional standards is a statement that does not impinge on a liberty interest. Raposa v. Meade School Dist. 46-1, 790 F.2d 1349 (8th Cir. 1986).

•Coaches claimed that when the school board decided not to rehire them, several members of the board made public statements about them that deprived them of their liberty. The statements were as follows: a change in coaches would be good for the school's athletic program; coaches had over 50 years' combined coaching experience and it was time for a change; good athletes didn't go out for sports because they didn't want to play for these coaches; and there were problems with profanity, lack of respect, discipline, and fairness. These statements did not meet the requisite standards for deprivation of a liberty interest. Smith v. Board of Educ. of Urbana Sch. Dist. No. 116, 708 F.2d 258 (7th Cir. 1983).

•A school board did not renew the contract of an assistant superintendent; the reasons for the nonrenewal were essentially that she was unable to perform her job because she was adversarial and unable to get along with and gain the respect of her coworkers. Those comments, which were made public pursuant to statute, were not found to implicate a liberty interest. Sullivan v. School Bd. of Pinellas County, 773 F.2d 1182 (11th Cir. 1985).

•Assuming that the superintendent told prospective employers that an assistant superintendent was terminated for "incompetence and outside activities," this does not amount to the type of communication which gives rise to a protected liberty interest. Allegations of incompetence do not imply the existence of serious character defects such as dishonesty or immorality and are not the sort of accusations that require a hearing. Robertson v. Rogers, 679 F.2d 1090 (4th Cir. 1982).

•A university athletic director was dismissed because he expressed disagreement with policy positions of his superiors. He argued that he was dismissed shortly after a memorandum surfaced implying to the world that he was fired because of malfeasance. He claimed that the university's refusal to grant him a hearing to clear his name deprived him of his liberty interest in his reputation. Even assuming that the memorandum, followed closely by his dismissal, suggested that he was fired for misconduct, the president's termination letter stated that the "decision to terminate 'does not reflect unfavorably on your performance as Athletic Director . . . [and] the University is most grateful for your work in solidifying the management controls in the Department.'" This statement removes any possibility that he was stigmatized by his dismissal. Nothing further would be gained from a name-clearing hearing. Hall v. Ford, 856 F.2d 255 (D.C. Cir. 1988).

•The letter informing a non-tenured university faculty member that his contract would not be renewed stated that the problems he had in teaching to be sufficiently severe to warrant not reappointing him. Statements about teaching inadequacies do not state a claim of injury to a constitutionally protected liberty interest. Lovelace v. Southeastern Mass. Univ., 793 F.2d 419 (1st Cir. 1986).

•A nontenured principal challenged his early dismissal, alleging a violation of his liberty interests in reputation. But his dismissal was not subject to due process requirements, because it implicated no liberty interests. There were no publicized charges of moral turpitude or dishonesty; instead, the reasons stated in the letter he received amounted to dismissal for incompetence, inability to relate well with others, and lack of tack. Hayes v. Phoenix-Talent Sch. Dist. No. 4, 893 F.2d 235 (9th Cir. 1990).

Dismissal Alone

The fact of a dismissal, standing alone, is unlikely to be an adequate basis for a liberty interest claim.

•Although there is a general public commonsense perception that the loss of one's job can be stigmatizing in itself, a nonrenewal standing by itself does not satisfy the legal requirements necessary for a liberty interest violation. Wells v. Hico Indep. Sch. Dist., 736 F.2d 243 (5th Cir. 1984).

•An inference drawn from a dismissal alone, even an early dismissal, is insufficient to implicate a liberty interest. Hayes v. Phoenix-Talent Sch. Dist. No. 4, 893 F.2d 235 (9th Cir. 1990).

•Mere nonrenewal of a teacher's contract is not such a blight upon his good name, reputation, honor, or integrity as to constitute a deprivation of liberty. Since the teacher proved nothing more, his liberty interests were not denied by nonrenewal of his contract. Noel v. Andrus, 810 F.2d 1388 (5th Cir. 1987).

•In conjunction with the nonrenewal of a principal's contract, the board president made a statement that appeared in the local newspaper that the nonrenewal based "on occurrences this year and continuance of previous concerns." That statement stigmatized him no more than the dismissal itself, and inferences drawn from a dismissal alone are not sufficient to implicate a liberty interest. Martin v. Unified Sch. Dist. No. 434, 728 F.2d 453 (10th Cir. 1984).

•A board that dismissed a school superintendent and "bought out" his contract did not implicate any protected liberty interest. His removal did not create any stigma nor render him unemployable. His good name was not called into doubt and no wrongdoing on his part was alleged. As a normal part of the political process, superintendents are frequently fired from one place and hired at another. Holloway v. Reeves, 277 F.3d 1035 (8th Cir. 2002).

•The denial of tenure or employment is not, by itself, stigmatizing conduct in the legal sense of the term. A termination is only stigmatizing if it impugns an employee's moral character or implies dishonesty or other job-related moral turpitude. Labeling an employee as incompetent or otherwise unable to meet an employer's expectations does not infringe the employee's liberty. There is no question that once a person has been denied tenure, finding another academic position is considerably more difficult; nevertheless, the plaintiff failed to show that the consequences of her tenure denial were no more severe than any other professional's failure to receive a desired promotion. Hedrich v. Board of Regents of Univ. of Wis. Sys., 274 F.3d 1174 (7th Cir. 2001).

•A university decided not to renew the contracts of two untenured assistant professors. They contended unsuccessfully that this decision restricted their liberty to take advantage of other employment opportunities. Although any dismissal or denial of reappointment, for whatever reason, may reflect negatively on a professor, this stigma alone is not of constitutional magnitude. Bunger v. University of Okla. Bd. of Regents, 95 F.3d 987 (10th Cir. 1996).

•A non-tenured librarian at a state university claimed a violation of her liberty interest, alleging that the dean had slandered her in the course of the nonrenewal hearings by stating publicly that she had to be removed "for the good of the library." There was, however, no showing that raised an implication that the university in merely declining to re-employ her imposed a stigma or other disability that foreclosed her freedom to take advantage of other employment opportunities. Montgomery v. Boshears, 698 F.2d 739 (5th Cir. 1983).

Change in Employment Status

Not every change in employment status constitutes the "plus" that supports a liberty interest claim. Something akin to a dismissal is required.

•The nonpunitive reassignment of a teacher, unless it involves a change in status that could be regarded as a loss of employment, does not give rise to a liberty interest meriting due process protection. Raposa V. Meade Sch. Dist. 46-I, 790 F.2d 1349 (8th Cir. 1986).

•A teacher's suspension with pay for one week did not satisfy the "plus" of the "stigma-plus" test. Hardiman v. Jefferson County Bd. of Educ., 709 F.2d (11th Cir. 1983).

•A plaintiff claimed defamation in addition to removal as a university department head, contending that he was publicly defamed by the rumors that circulated in the department regarding his removal and by the provost's statement to a student newspaper that nonrenewal of his appointment was "in the best interests of the department." It was not clear, however, that defamation unaccompanied by termination of employment or another change in plaintiff's legal status constituted a deprivation of liberty under the fourteenth amendment; an individual has no constitutionally protected interest in reputation alone. Plaintiff was terminated as department head, but continued to be employed by the university as a full-time, tenured professor at full salary. He had made no showing that a definite range of opportunities was no longer open to him. In light of these facts, defendants' alleged actions did not violate his clearly established fourteenth amendment right to liberty. Garvie v. Jackson, 845 F.2d 647 (6th Cir. 1988).

•Since a university professor remained employed with pay during his suspension, his claim is barred. While his temporary removal from class duties may have further stigmatized him, this action does not constitute a deprivation of employment. Edwards v. California Univ. of Penn., 156 F.3d 488 (3rd Cir. 1998), cert. denied 119 S.Ct. 1036.

Loss of Employment Opportunities

Claims of a lost opportunity for other employment have generally been unsuccessful.

•A public school principal applied for two different higher administrative positions, but was not hired. She argued that school officials, by saying she was denied the appointments she sought because she lacked managerial experience, stigmatized her and thus deprived her of occupational liberty. Her argument was deemed to be frivolous; a routine denial of a promotion to a position for which there are competing applicants is not the stuff out of which a violation of due process is made. Yatvin v. Madison Metropolitan Sch. Dist., 840 F.2d 412 (7th Cir. 1988).

•Due process protects a generalized right to choose one's field of employment, but one does not have a liberty interest in working for a specific employer. Thus, a decision to bar a custodian from future employment with the community college district did not violate his due process rights. Llamas v. Butte Cmty. College Dist., 238 F.3d 1123 (9th Cir. 2001).

•A football coach was suspended because of the way he treated his players; no explanation was given to the public. He alleged that the failure to provide the public with an explanation for the suspension and leaving people to speculate publicly stigmatized him and damaged his reputation. But to invoke the procedural protection of the due process clause through a claim of injury to liberty interests, a discharged public employee must allege, for example, that defendants imposed a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. In this instance, the plaintiff had quickly obtained another teaching-coaching position. Lancaster v. Independent Sch. Dist. No. 5, 149 F.3d 1228 (10th Cir. 1998).

Publication

To maintain a cause of action for deprivation of a protected liberty interest, the plaintiff must show that the defendant was in some way responsible for making public the defamatory statements.

Publication in Personnel Files

•Even if defamatory charges are not publicized, when stigmatizing information is retained in an employee's personnel file, that may be sufficient to trigger due process protections, especially if the file were made available to prospective employers. Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623 (2nd Cir. 1996), cert. denied 519 U.S. 1150 (1997); see also Winegar v. Des Moines Indep. Cmty. Sch. Dist., 20 F.3d 895, 899 n. 3 (8th Cir. 1994); Brandt v. Board of Coop. Educ. Serv.. 820 F.2d 41 (2nd Cir. 1987) (Brandt I).

No Publication

•A name-clearing hearing significantly reduces the risk that an employee will be dismissed with false stigmatizing charges placed in his or her personnel file. If and when the allegations are shown to be false,

BEST COPY AVAILABLE

their removal from the employee's file restores his or her freedom to seek future employment. Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623 (2nd Cir. 1996), cert. denied 519 U.S. 1150 (1997).

•The removal of stigmatizing allegations from a teacher's personnel file and the superintendent's directive to subordinates not to reveal to prospective employers the allegations that led to teacher's dismissal vitiated the teacher's due process claim. There was no longer a likelihood that the teacher would be denied future job opportunities because of the allegations formerly contained in his file. Brandt v. Board of Coop. Educ. Serv., 845 F.2d 416 (2nd Cir. 1988) (Brandt II).

•A probationary teacher argued that his dismissal denied his liberty interests because it was based upon charges of dishonesty, based on his unauthorized use of a driver training car. There is no deprivation of liberty absent injury to employment or employment opportunities, with a later denial of procedural due process for its redress. His claim failed, however, because a plaintiff must establish public disclosure of the adverse allegations, and the teacher did not prove publication. Noel v. Andrus, 810 F.2d 1388 (5th Cir. 1987).

•Speculative rumors circulating in the community as a result of defendants' failure to publish disparaging statements do not establish a deprivation of a liberty interest. Lancaster v. Independent Sch. Dist. No. 5, 149 F.3d 1228 (10th Cir. 1998).

•A principal did not establish a protected liberty interest, because he failed to show that the board voluntarily disclosed to the public the reasons for his reassignment . Wooten v. Clifton Forge Sch. Bd., 655 F.2d 552 (4th Cir. 1981).

•Communication of stigmatizing statement only to other administrators does not satisfy the requirement that statement be made "public." See Vega v. Miller, 273 F.3d 460 (2nd Cir. 2001), cert. denied, 122 S.Ct. 2295 (2002).

•Stigmatizing information disseminated to the point that an outside private investigator was hired and a number of students were interviewed satisfied the publication requirement. Winegar v. Des Moines Indep. Cmty. Sch. Dist., 20 F.3d 895 (8th Cir. 1994).

•Even if the reasons in a letter to a principal dismissed before the end of the school year amounted to stigmatizing charges, it would be irrelevant because the school district did not disclose the reasons to the public. Hayes v. Phoenix-Talent Sch. Dist. No. 4, 893 F.2d 235 (9th Cir. 1990).

•To allow the potentially stigmatized party to satisfy the publication prong by disseminating details surrounding his termination would contradict the purposes of the publication requirement. Llamas v. Butte Cmty. College Dist., 238 F.3d 1123 (9th Cir. 2001).

•Injury to reputation cannot occur in the absence of public disclosure of the allegedly damaging statements. Notwithstanding a report's title, "President's Report to the Board," it was prepared solely for the incoming president and was neither circulated to the board of trustees nor made available to the public. Orange v. District of Columbia, 59 F.3d 1267 (D.C. Cir. 1995).

•A community college board did not compromise the superintendent's liberty interest by merely providing a public forum at which others independently may have defamed the superintendent. Loehr v. Ventura County Cmty. College Dist., 743 F.2d 1310 (9th Cir 1984).

•Once the charges against a community college employee were validated at an evidentiary hearing that comported with due process, a subsequent disclosure of the reasons for dismissal would not violate her constitutional rights. Jones v. Los Angeles Cmty. College Dist., 702 F.2d 203 (9th Cir. 1983).

Contrasting Burdens of Proof

•Plaintiff could not maintain his cause of action because he neither alleged nor proved that the school district was responsible for the charges against him becoming public knowledge. Hardiman v. Jefferson County Bd. of Educ., 709 F.2d (11th Cir. 1983).

•Plaintiff could proceed with lawsuit unless defendant school district officials could conclusively demonstrate that they did not disseminate stigmatizing information that plaintiff was fired because he was a thief. Goetz v. Windsor Cent. Sch. Dist., 698 F.2d 606 (2nd Cir. 1983).

Denying the Truth of the Allegations

To maintain a cause of action for deprivation of a liberty interest, the plaintiff must have denied the truth of the defamatory statements.

Purpose of Denial

•There would be no purpose in holding a name-clearing hearing if the charges are uncontroverted. Thus, a principal who did not deny the truth of the allegations made against her was not entitled to a name-clearing hearing. Coleman v. Reed, 147 F.3d 751 (8th Cir. 1998).

Contrasting Burdens of Proof

•A plaintiff must only raise the issue of falsity regarding the stigmatizing charges -- not prove it -- in order to establish a right to a name-clearing hearing. Brandt v. Board of Coop. Educ. Serv., 820 F.2d 41 (2nd Cir. 1987) (citing Codd v. Velger).

•An employee must show that a public official made defamatory statements about him. The statements must be false assertions of fact. True but stigmatizing statements that preclude further government employment do not support this type of claim, nor do statements of opinion, even stigmatizing ones, if they do not imply false facts. Because a teacher-coach could not provide evidence of false statements made by public officials, he could not satisfy the elements of the employment defamation cause of action. Strasburger v. Board of Educ. of Hardin County., 143 F.3d 351 (7th Cir. 1998).

Process Due

An employee's due process rights to protected liberty interests are vindicated by having available an opportunity for an adequate hearing.

Purpose of Hearing

•The hearing required is for the limited purpose of giving a discharged employee an opportunity to clear his or her name. The employer need not rehire the employee even if he or she can prove the inaccuracy of the stigmatizing allegations. Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623 (2nd Cir. 1996).

Employee Request

•A college basketball coach, who was suspended and then terminated, claimed that his liberty interests were violated by publication of disparaging statements about his treatment of players. His claim failed because he did not sufficiently apprise the university of his desire for a name-clearing hearing following the dissemination of the statements. Ludwig v. Board of Trustees of Ferris State Univ., 123 F.3d 404 (6th Cir. 1997).

Adequate Hearings

•One's liberty interest is not implicated until the stigmatizing information is published. Although the advantages of a prepublication hearing should be obvious to a prudent public employer who wants to avoid liability for a liberty interest deprivation, a name-clearing hearing may be constitutionally adequate even if it occurs after publication. Rankin v. Independent Sch. Dist. No. I-3, 876 F.2d 838 (10th Cir. 1989).

•A board gave a teacher notice and an opportunity to be heard by conducting a full evidentiary hearing, at which he was allowed to present evidence and the testimony of his witnesses, to cross-examine adverse witnesses, and to argue his position to the board. Due process (to protect an assumed liberty interest) required no more. Vukadinovich v. Board of Sch. Trustees of Mich. City Area Schs., 978 F.2d 403 (7th Cir. 1992).

•An arbitration hearing, a meeting with administrators prior to his suspension, and a hearing before administrators prior to his transfer, afforded a teacher an adequate opportunity to clear his name. Mustafa v. Clark County Sch. Dist., 157 F.3d 1169 (9th Cir. 1998).

•Even if a principal had been entitled to a name-clearing hearing, procedural due process was satisfied because she received not one, but two such opportunities. The due process requirements pronounced in Loudermill apply equally to liberty and property interests. She had a chance to explain the allegations in her meeting with an associate superintendent and before the Board at an open meeting. This is more than the administrators were constitutionally required to provide. Coleman v. Reed, 147 F.3d 751 (8th Cir. 1998).

•A hearing before the "committee on tenure and related problems," which include sessions each week for approximately nine months, resulted in a recommendation for dismissal of a law professor on grounds of moral turpitude. The charges were based on a sexual encounter with a student. The professor did, indeed, have a liberty interest in his reputation, deserving of due process protection. However, even if the university infringed that interest, the hearing had provided him with an adequate opportunity to clear his name. Tonkovich v. Kansas Bd. of Regents, 159 F.3d 504 (10th Cir. 1998).

•An assistant professor who had been denied tenure invoked his right to a hearing before a grievance committee to challenge that decision. That hearing also provided him an opportunity to refute any defamatory charges related to excessive drinking and other questionable behaviors. Beitzell v. Jeffrey, 643 F.2d 870 (1st Cir. 1981).

•A school bus driver dismissed for sexual misconduct with students claimed unsuccessfully that his pre-dismissal hearing was not constitutionally adequate. The board had informed him of the charges against him and gave him an opportunity to prove those charges false. The charges against him were based on the handwritten statements of ten different children who regularly rode his bus; he was allowed to see the statements, but the children were not identified nor did they testify at the hearing. He claimed that he was not given a chance to attack the credibility of the children who had accused him. The was no chance, however, that all the children fabricated their stories because each gave her statement individually to a police investigator and in her own words; they statements did not reflect any common phrases and stories. Each child's statement was signed by a parent who reviewed the statement in the presence of the child and the investigator. These procedures adequately protected plaintiff against any risk that the children were out to get him. Green v. Board of Sch. Com'rs of City of Indianapolis, 716 F.2d 1191 (7th Cir. 1983).

Not Adequate Hearings

•A teacher who was attacked by a student defended himself. He was suspended. Subsequent investigations led to a charge of unjustified physical abuse and a punitive transfer to another school. Although he had an opportunity to present his side of the story prior to the suspension, he did not have an opportunity for a meaningful hearing later in the process, where he could present and cross-examine witnesses. Neither the meetings he had with school officials nor the extensive investigations conducted by outside investigators satisfied the requirements of due process. Winegar v. Des Moines Indep. Cmty. Sch. Dist., 20 F.3d 895 (8th Cir. 1994).

•A board voted to dismiss a teacher during the school year on grounds of immoral conduct. Prior to the dismissal the teacher had no opportunity for a hearing; then, about one month later the board did provide an opportunity for a legally adequate hearing. Although the dismissal was found to be justified, the teacher had been entitled to a pre-termination hearing and the case was remanded for a determination of compensatory damages for the board's violation of procedural due process in that it failed to protect the teacher's liberty interest. Vanelli v. Reynolds Sch. Dist. No. 7, 667 F.2d 773 (9th Cir. 1982).

•A employee's opportunity to meet with an administrator who was three steps removed from the community college board that actually made the decision to dismiss her was to remote from the actual decision-makers to provide the requisite due process. Jones v. Los Angeles Cmty. College Dist., 702 F.2d 203 (9th Cir. 1983).

Concluding Observations

•In many instances, a hearing adequate to protect an employee's liberty interest will already be available to protect the employee's property interest pursuant to statute, policy, or contract.

•Even if no hearing is required by statute, policy, or contract, administrators should be alert to the possible constitutional requirement for making a hearing available for an employee to challenge defamatory statements made in conjunction with a dismissal.

- If an employee is informed of the reasons for the dismissal, and those reasons constitute allegations of dishonesty, illegality, or immorality, then it would seem reasonable to afford that employee an opportunity to refute those charges before the officials making the dismissal decision.

- If defamatory information is maintained in a personnel file, then the employee should be made aware of that information and given an opportunity to refute it.

- In most instances, the less made public about the grounds for a dismissal, the better. But sometimes circumstances may demand that some reasons be given. If so, the explanation should focus on what the person did or failed to do, not on that person's traits or characteristics.

THE EMERGENCE OF A FOURTH TYPE OF PUBLIC FORUM: IS THE QUASI-NONPUBLIC FORUM A NEW PARADIGM FOR STUDENT FREE SPEECH CASES?

Elizabeth T. Lugg, J.D., Ph.D.
Associate Professor, Illinois State University

Frances R. A. Paterson, J.D., Ed.D.
Associate Professor, Valdosta State University

I. Paradigmatic Statements Regarding Students' Constitutional Rights

A. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[1] Indeed, Justice Brennan, concurring in *Fraser* described this proposition as "unimpeachable."[2]

B. "[The] constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[3]

II. Foundation Student Speech Cases

  A. *Tinker v. Des Moines Independent Community School District*--Suspension of students for wearing black armbands to protest Vietnam War violated the First Amendment.[4]

  B. *Bethel School District No. 403 v. Fraser*--Suspension of student for vulgar and lewd speech did not violate student's free speech rights.[5]

  C. *Hazelwood School District v. Kulhmeier*--Excision of controversial material from school sponsored newspaper did not violate the First Amendment.[6]

  D. The *Tinker/Fraser/Kulhmeier* Standard: School officials could ban or punish speech if

    1. They could reasonably forecast a material disruption of the school or school activities, or
    2. Speech was vulgar or lewd, or
    3. Speech carried the imprimatur of the school.

III. Erosion of the *Tinker/Fraser/Kulhmeier* Standard

  E. *Chandler v. McMinnville School District*[7]

    1. Facts

      a. The teachers at McMinnville, Oregon commenced a lawful strike in February 1990. The school district hired replacement teachers. Two students at McMinnville High School, whose fathers were among the strikers, arrived at school with buttons and stickers on their clothing which read "I'm not listening scab" and "Do scabs bleed." They distributed similar buttons to their classmates.

      b. When the principal became aware of the buttons, he asked the two students to remove the buttons because they were disruptive. Both the students and teachers stated that the buttons had not disrupted the educational atmosphere during morning classes, but the principal continued to insist that the buttons be removed. The students removed and were suspended for the remainder of the day.

      c. The next day the students returned with similar buttons and stickers. This time, when one of the two students was asked to remove the buttons containing the word "scab" he did so out of fear of further disciplinary actions. The students then filed suit in district court alleging that the school officials' reasons for requesting the removal of the buttons were false and pre-textual, and therefore violated their First Amendment rights of freedom of expression.[8]

2. Holding--Under *Tinker* the "scab" buttons were not inherently disruptive, thus the dismissal by the lower court is reversed and the case is remanded for a finding of fact.
3. Rationale
   a. Student speech can be regulated if lewd, vulgar, obscene, or offensive under *Bethel*, school-sponsored speech can be regulated under *Kulhmeier*, and all other speech by the "material and substantial disruption" test found in *Tinker*.
   b. Mere use of the word "scab" was not inherently disruptive thus the school district could not suppress such speech absent the showing of a substantial disruption to school activities.

F. *Hedges v. Wauconda Community Unit School District No. 118*[9]
1. Facts
   a. The principal of an Illinois school district confiscated religious tracts from an eighth grade student, Megan Hedges, who was distributing them outside her junior high school. At the time (1990), district policy prohibited elementary and junior high school students from distributing "written material. . . of a religious nature."[10]
   b. After a district court decision striking down the policy the district instituted a policy allowing students to distribute up to 10 copies of written materials before and after school at a table near the front entrance to the school building and prohibiting, inter alia, the distribution of religious material that students might construe as school sponsored and students from distributing materials that are "primarily prepared by non-students or which concern the activities, or meetings of non-school-sponsored organizations."[11]
   c. The principal forbade Megan from handing out more than 10 copies of her tract or a flyer inviting students to an activity at her church, but permitted her to distribute a position paper.
2. Holdings
   a. Unconstitutional
      (1) Original policy prohibiting distribution of religious materials
      (2) Revised policy's prohibiting the distribution of religious material that school believed students might reasonably conclude to be school-sponsored or endorsed.
   b. Constitutional
      (1) Time, place and manner restrictions
      (2) Revised policy's prohibiting the distribution of materials was prepared by third parties
3. Rationale
   a. Establishment Clause analysis

- (1) Although the *Hedges* court notes that the justices are not of one mind regarding Establishment Clause analysis, it only uses coercion analysis, which it disposes of very quickly, and the endorsement test.
- (2) No endorsement in permitting political or religious speech.
  - (a) What an institution permits is not necessarily attributed to it.
  - (b) School discharges its duty of religious neutrality under the endorsement test when it and its agents refrain from engaging in religious speech.
- (3) Dismisses the district's argument that *Widmar* and *Lambs' Chapel* and *Mergens* are inapposite because they concern colleges and high schools, respectively.[12]
- (4) Mixes in free speech analysis and charges the school with educating its students in the nuances of non-endorsement under the Establishment Clause.

b. Forum analysis
- (1) Cites *Lamb's Chapel* for the proposition that a school is a nonpublic forum which, while it is not required to open its doors to nonpublic speakers, may not engage in content or viewpoint discrimination or adopt "unjustified [unreasonable] regulations."[13]
- (2) Cited Kennedy's concurrence in *International Society for Krishna Consciousness, Inc. v. Lee*. "Whether the increasing complexity of public-forum doctrine has more to offer may be doubted."[14]
- (3) Schools can refuse to open themselves to expressive use by non-students, and students themselves are highly regimented by school officials.
- (4) Distinguished between permissible suppression of incivility, i.e., speech that undercuts the school's mission of inculcating students in the habits of civility (*Fraser*) and the impermissible suppression of similar speech by authorities outside the school environment (*Cohen*).[15]

G. *Muller by Muller v. Jefferson Lighthouse School*[16]

1. Facts
   - a. Fourth grade student requested permission to distribute invitations to religious meeting to be held at his church.
   - b. Not clear whether student intended to distribute during class or non-instructional periods
   - c. When principal refused based on religious nature of materials, he received call from Liberty Counsel.
   - d. According to principal, he told family that distribution of materials was limited to those related to school projects and programs, but gave permission for student distribute to specific friends. Principal stated that even if student distributed materials he might not be caught or if caught he would only be admonished that he should have gotten permission.
   - e. Family alleged that principal refused on the grounds that if he granted permission for distribution he would have to grant permission for other churches to distribute materials.

f. Principal claimed that permitting the distribution of non-school materials required permission from central office.

g. District policy required principal's permission before distribution of non-school-sponsored materials. She or he could refuse if materials were libelous, contained obscene language, incited illegal actions, insulted groups or individuals, or threatened based on a reasonable forecast to greatly disrupt or materially interfere with school operations and intrude into school affairs or intrude into the lives of others. Principal and student were to agree on time and place for distribution.

2. Holdings

 a. Public elementary school was nonpublic forum.

 b. Upheld district policy for distribution of non-school-sponsored materials

  (1) Prior approval

   (a) Reasonable

   (b) Procedural safeguards were adequate

   (c) Did not implicate Establishment Clause

   (d) Screening for offensive messages was not improper content restriction

  (2) Time and place restriction valid

  (3) Disclaimer, i.e., statement of non-endorsement by district permissible

3. Rationale

 a. Students' constitutional rights not co-extensive with those of adults

 b. Traditional approach to education (*Acton*), "nurturing authority" whose purpose is to inculcate values outweighs student's free speech rights because emphasis is preparing students for citizenship rather than permitting the present expression of the rights of citizenship. Includes "custodial and tutelary" language from *Acton*.

 c. Court gives cursory nod to school as expressive forum/students as autonomous individuals/marketplace of ideas.[17]

 d. Discusses in loco parentis doctrine and its abrogation by *Tinker*[18]

 e. Discusses *Fraser* and makes special point of noting that age is a particular factor, i.e., the effect of offensive speech on 14 year-olds at issue in *Fraser*[19]

 f. Cites *Kulhmeier* for the following propositions

  (1) "'A school need not tolerate student speech that is inconsistent with its basic educational mission.'"[20]

  (2) A limited public forum in public schools requires an intent on the part of school authorities to open school facilities to "'indiscriminate use by the general public or some segment of the public such as student organizations.'"[21]

 g. The proper test for nonpublic fora is rational basis, i.e., "'reasonably related to legitimate pedagogical concerns.'"[22]

 h. Emphasized the distinction between elementary and high schools

  (1) "[F]ourth-graders [do not] have the free expression rights of high school students."[23]

(2) If high schools can suppress speech to protect students, for example, *Fraser* (protecting 14-year-olds from sexual innuendo) and *Kulhmeier,* then elementary schools can protect "five through thirteen-year-olds from topics and viewpoints that could harm their emotional, moral, social, and intellectual development."[24]

(3) Marketplace of ideas significantly less important in elementary schools than in high schools

i. Seventh Circuit declined to overrule its *Hedges* decision to declare elementary schools are limited or designated public fora.

(1) District policies/restrictions indicate that district did not intend schools to be public fora.

(2) The "'verbal cacophony'" of public forum could overwhelm elementary school's "delicate 'custodial and tutelary' environment."[25]

j. Inculcation of civility

(1) A primary responsibility of public education

(2) Includes power to suppress speech that might "crush a child's sense of self-worth."[26]

(3) Beyond noting that the elementary school is not the place for Christians to tell Jews they are damned or Jews to tell Christians they are not part of God's chosen people, as is permissible in a public forum, the court does not explore how invitation to church function might "crush a child's sense of self-worth."[27]

(4) Schools may act to protect students because they are a captive audience (upholding school's prior restraint policies).[28]

(5) Schools can engage in content restrictions and if the speech is "fundamentally 'inconsistent with its basic educational mission,'" or otherwise inconsistent with its legitimate pedagogical concerns."[29]

(6) Here, school officials did not act improperly because student speech at issue could be considered "insult[ing] to [a] group or individuals and [an] intru[sion] into. . . the lives of others" as specified in district's policy.[30]

4. Comment--Note that the *Chandler* court reaches contrary result from that of the *Muller* court regarding student religious speech, i.e., in *Chandler v. Seigelman* the Eleventh Circuit, held that school administrators could not suppress student religious speech although it discussed *Muller* with great approval, arguing that school officials could suppress the secular speech of a secondary school student in *Denno v. School Board of Volusia County*.[31] Note, too, that the Eleventh Circuit decided *Denno* just three months before it decided *Chandler*.

H. *West v. Derby Unified School District # 260*[32]

1. Facts

a. Kansas school district has experienced a number of racial incidents, including but not limited to, the harassment of students, especially at the middle school and spray-painted KKK graffiti, and an attempt by members of the Aryan Nation to recruit new members at the high school.[33] In response the district adopted a racial harassment policy as recommended by its 350 member Racial and Social Equity

BEST COPY AVAILABLE

Task Force which provided, inter alia, Students shall not have in their possession any written material, either printed or in their own handwriting, that is racially divisive or creates ill will or hatred." The policy gave several examples, including Confederate insignia.[34] After the policy was adopted by the board, the number of racial incidents declined substantially.[35]

   b. T.J., a seventh grade student who had already been admonished twice for making racially derogatory remarks, drew a copy of the Confederate flag on a piece of paper in his mathematics class and displayed it to three of his classmates although he did not use it to harass or intimidate any students.[36] After a student took the drawing to T.J.'s teacher, the assistant principal suspended him for three days under the board's racial harassment policy.[37]

2. Holdings
   a. District did not violate student's Fourteenth Amendment due process or equal protection rights.
   b. Suspension did not violate student's First Amendment free speech rights.
   c. District's policy was neither unconstitutionally overbroad nor void for vagueness.
3. Rationale
   a. Free Speech
      (1) Cited *Tinker*
         (a) Public school students' free speech rights are not coextensive with those of adults.
         (b) Schools may suppress speech 'that might "substantially interfere with the work of the school or impinge upon the rights of other students."'[38]
      (2) Here, school officials did not have an "undifferentiated fear or apprehension" of disturbance but did have substantial past evidence to forecast disruption.[39]
      (3) The Tenth Circuit explicitly adopted the district court's First Amendment analysis.
         (a) Cited *Fraser* for the proposition that public school students do not have the same latitude regarding free speech rights as is afforded adults.[40]
         (b) Student's "speech"/rendition of Confederate flag unrelated to academics, i.e., educational mission of school.[41]
         (c) Court saw fit to include a discussion of the divisive nature of the Confederate flag.
         (d) Although the court did not need to reach the inculcation of civility "doctrine" under *Fraser*, it noted that "[p]art of a public school's essential mission must be to teach students of differing races, creeds and colors to engage each other in civil terms" and the district was within its "lawful authority" to "insis[t] upon more civil terms of debate."[42]
   b. Overbreadth

(1) Policy as applied was not overbroad because district had not disciplined any student depictions of Confederate in materials with legitimate pedagogical purpose.[43]

(2) Again, the circuit court explicitly incorporated the reasoning of the court below when it found in considering whether the district engaged in improper content discrimination. District' policy as written or applied was not improper content discrimination by distinguishing between permissible, e.g., illustrations in history books, displays of state flags, and impermissible display of Confederate flag. Differentiating between these renditions of the symbol was a "narrowing construction" consistent with *Tinker* exception for potentially disrupting speech.[44]

c. Comments–Does "civil" include religious proselytizing with its implications of religious inferiority? In the eyes of many, the Confederate flag at issue in *Denno*, especially the Naval Jack or battle flag, connotes racial inferiority.

I. *Denno v. School Board of Volusia County*[45]

1. Facts--Florida school district suspended high school student, Wayne Denno for displaying Confederate flag. Wayne, who participated in Civil War reenactments and living histories as part of his deep interest in Civil War history, showed a four inch square Confederate flag to a small group to friends during a lunch break at school. Wayne was explaining his participation in various activities connected with his interest in Civil War history. When assistant principal Roberts saw Wayne showing the flag to his friends, he suspended him for nine days.

2. Holding –Administrators were entitled to qualified immunity because their conduct did not violate a clearly established right of which a reasonable school administrator would have known (subjective standard).

3. Rationale

a. Qualified immunity

(1) Because administrators were not final policymakers, the court would not impute liability to the board liability for their conduct.

(2) In addition, imputing liability to the board would require a pattern or practice of the complained of behavior, and in *Denno* there was no pattern or practice of banning Confederate symbols.

b. Student free speech rights

(1) Heavy reliance on *Fraser*

(2) Students' constitutional rights not coextensive with those of adults.[46]

(3) "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers--and indeed the older students--demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.'"[47]

(4) *West v. Derby Unified School District*[48]

(a) One interesting aspect of the Eleventh Circuit's discussion of *West* is its emphasis on the district court rather than the Tenth Circuit's opinion and notes that the Tenth Circuit adopted the reasoning of the district court's first holding, i.e., that under *Tinker* the restriction was permissible because in light of past events at the school, "'a student's display of the Confederate flag might cause disruption. . . .'"[49]

(b) Potential offensiveness equals a reasonable forecast of disruption

(c) Students free speech rights versus the school's countervailing interest in teaching civilty/boundaries of socially appropriate behavior

(d) Adopts what the *Denno* court calls a "flexible reasonableness standard" from *Muller*[50]

(e) Are restrictions reasonably related to legitimate pedagogical concerns?

(f) School is not public forum vis à vis students personal communications to each other.

(g) "Custodial and tutelary" function of *Acton* combined with *Fraser* permits parent-like guidance inappropriate for [true] public forum[51]

(h) *Tinker* plus flexible reasonableness standard that includes teaching civility

c. Comments

(1) What makes *Denno* particularly interesting (an issue that was not addressed by court) is the fact that Confederate symbol or battle flag is part of Georgia's state flag.

(2) Another interesting aspect of *Denno* is that arguably the student was engaged in a serious discussion of an avocation that has real implications for learning, i.e., nonacademic, nonschool learning.

J. *Cole v. Oroville Union High School District*[52]

1. Facts

a. Oroville High School has historically included in the graduation ceremony a spiritual invocation delivered by a student chosen by a vote of his or her classmates. Under a district policy instituted sometime around 1985, all student speeches and invocations for graduation are reviewed by the principal, who has the final say regarding their content.[53]

b. Cole and Niemeyer were chosen to give the invocation but were very late in turning in their speeches for administrative approval. Niemeyer state he did not submit his speech to his faculty advisors for review of the speech's content "because I know they don't hold the same convictions that I do as far as faith."[54] When the speeches were finally submitted the principal told them to tone down the proselytizing and sectarian religious references; make them more nondenominational. The students refused and speeches were rejected.[55]

2. Holding

a. "District officials did not violate the students' freedom of speech. Even assuming the Oroville graduation ceremony was a public or limited public forum, the District's refusal to allow the students to deliver a sectarian speech or prayer as part of the graduation was necessary to avoid violating the Establishment Clause. . . ."[56]

3. Rationale
    a. The invocation was not private speech, because the district authorized it, the graduation ceremony was held on school grounds, only a student selected through a voting procedure dictated by the district was allowed to use the public address system to give the invocation.
    b. Likewise, the valedictory speech fell under the plenary control over the graduation ceremony and would have borne the imprint of the district. The district authorized the valedictory speech as part of the district-administered graduation ceremony, held on district property and financed in part by tax dollars in which only selected students are allowed to speak.
    c. Moreover, the district retains final supervisory control over the content of the speech.

K. *Saxe v. State College Area School District*[57]
1. Facts
    a. In August 1999, the State College Area School District (SCASD) adopted an Anti-Harassment Policy which set for the district's goal of "providing all students with a safe, secure, and nurturing school environment."[58] In order to obtain that goal, the SCASD policy forbid harassment which it had defined as follows:

    > "Harassment means verbal or physical conduct based on one's actual or perceived race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment."[59]

    b. This definition was followed by a series of examples of what would be considered harassment as well as additional definitions of various types of harassment. Punishment for anyone found guilty of harassment included counseling, suspension and expulsion.
    c. Plaintiff David Saxe was a member of the Pennsylvania State Board of Education, an unpaid volunteer for the SCASD, and a parent of students enrolled in the SCASD. In his complaint he alleged that the SCASD policy was unconstitutional under the First Amendment's free speech clause for vagueness and over-breadth. The basis for his claim was that the wording of the policy infringed upon the rights of his children to speak out about the sinful nature and harmful effects of homosexuality as taught by the children's religion. Moreover, because of the vague wording of the policy, it also posed a danger of chilling other free speech acts regarding the children speaking about their religious beliefs.
    d. The district court dismissed the plaintiffs' free speech claims based on its conclusion that "harassment," as defined by federal and state anti-discrimination statutes is not entitled to First Amendment protection. The court rejected the plaintiffs' characterization of the policy as a "hate speech code," holding instead that it merely prohibited harassment that was already unlawful under state and federal law.[60]

2. Holding--"We disagree with the District Court's reasoning. There is no categorical "harassment exception" to the First Amendment's free speech clause. Moreover, the SCASD Policy prohibits a substantial amount of speech that would not constitute actionable harassment under either federal or state law."[61]
3. Rationale
   a. No harassment exception to protected speech
      (1) "There is of course no question that non-expressive, physically harassing conduct is entirely outside the ambit of the free speech clause. But there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another's race or national origin or that denigrate religious beliefs. . . When laws against harassment attempt to regulate oral or written expression on such topics, however, detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications."[62]
      (2) "Harassing or discriminatory speech, although evil and offensive, may be used to communicate ideas or emotions that nevertheless implicate First Amendment protections. As the Supreme Court has emphatically declared, 'if there is a bedrock principle underlying the first Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable. For this reason, we cannot accept SCASD's contention that the application of anti-harassment law to expressive speech can be justified as a regulation of the speech's 'secondary effects.'"[63]
      (3) "In short, we see little basis for the District Court's sweeping assertion that 'harassment"– at least when it consists of speech targeted solely on the basis of its expressive content–"has never been considered to be protected activity under the First Amendment." Such a categorical rule is without precedent in the decisions of the Supreme Court or this Court, and it belies the very real tension between anti-harassment laws, and the Constitution's guarantee of freedom of speech."[64]
   b. Policy's reach is too broad
      (1) "The policy prohibits harassment based on personal characteristics that are not protected under federal law. . . .The Policy, in contrast, is much broader, reaching, at the extreme, a catch-all category of "other personal characteristics."[65]
      (2) By prohibiting disparaging speech directed at a person's "values," the Policy strikes at the heart of moral and political discourse – the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about "values" may offend is not cause for its prohibition, but rather the reason for its protection" "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' No court or legislature has ever suggested that

unwelcome speech directed at another's 'values' may be prohibited under the rubric of anti-discrimination."[66]

(3) "Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under *Kulhmeier*, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to Tinker's general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others."[67]

(4) "The policy, even narrowly read, prohibits a substantial amount of non-vulgar, non-sponsored student speech. SCASD must therefore satisfy the *Tinker* test by showing that the policy's restrictions are necessary to prevent substantial disruption or interference with the work of the school or the rights of other student. Applying this test, we conclude that the policy is substantially overbroad. . . .Although the SCASD correctly asserts that it has a compelling interest in promoting an educational environment that is safe and conducive to learning, it fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under the policy. The policy, then, appears to cover substantially more speech than could be prohibited under *Tinker's* substantial disruption test. Accordingly, we hold that the policy is unconstitutionally overbroad."[68]

L. *Castorina v Madison County School Board*[69]

1. Facts
   a. Plaintiffs were students at Madison Central High School, Madison County, Kentucky. On September 17 the two plaintiffs, Timothy and Tiffany, came to school wearing matching Hank Williams, Jr. concert T-shirts which had been given to them by Tiffany's father. On the front of the shirts was a picture of Hank Williams, Jr. On the back were two confederate flags and the phrase "Southern Thunder." Timothy and Tiffany stated that they were wearing the shirts to commemorate Hank Williams, Jr.'s birthday and to express their southern heritage. When the principal saw the shirts he informed Timothy and Tiffany, neither of whom had experience prior disciplinary problems, that the confederate flag emblem violated the school's dress code. He based this statement on his interpretation of the dress code which "prohibits students from wearing any clothing or emblem that is obscene, sexually suggestive, disrespectful, or which contains slogans, words or in any way depicts alcohol, drugs, tobacco or any illegal, immoral, or racist implication."[70]
   b. The principal gave them the option of either turning the shirts inside out or returning home to change. They refused so their parents were called. He informed the parents that if they could convince the kids to go home and change their shirts there would be no disciplinary action; if not Timothy and Tiffany would be suspended for three days. The parents support the decision of their children and Timothy and Tiffany were suspended.

   c. At the end of the three days, the two students returned wearing the same shirts and were suspended for another three days. They never returned to Madison Central and were home-schooled by their parents
   d. The district court found that wearing the T-shirts did not qualify as "speech" and that even if it were "speech," the plaintiffs failed to show a First Amendment violation. In addition, the court rejected the plaintiffs' contention that the school dress code was vague and
2. Holding
   a. The wearing of a confederate flag T-shirt qualifies as the type of speech covered by the First Amendment.
   b. The issue as to enforcement of the dress code policy needs to be heard by the district court.
3. Rationale
   a. Symbolic Speech
      (1) The test laid out by the Supreme Court was whether an intent to convey a particularized message was present and whether the likelihood was great that the message would be understood by those who viewed it.[71]
      (2) "We conclude that the plaintiffs intended to express more than a mere appreciation for the life and music of either performer. Further, their decision to return to school at the end of the first suspension still wearing the T-shirts demonstrates that the students fully appreciated the message that school administrators understood the T-shirts to convey. Because the plaintiffs' intended expression was both a commemoration of Hank Williams, Sr.'s birthday as well as a statement affirming the plaintiffs' shared southern heritage, their decision to wear Hank Williams T-shirts constitutes speech falling within the First Amendment.
   b. School board's authority to regulate student speech
      (1) This case is governed by *Tinker v. Des Moines Independent Community School District*, *Hazelwood School District v. Kulhmeier*, and *Bethel School District No. 403 v. Fraser*.
      (2) "Viewing the facts in the light most favorable to the students, the school has banned only certain racial viewpoints without any showing of disruption. As a result, without any formal factual findings to guide us, we see no obvious differences between the *Tinker* and Madison County situations other than the fact that the Des Moines School Board adopted a formal policy banning black armbands before the students ever wore them, whereas the Madison County School Board banned Confederate flags in a more "ad hoc" manner. This means that in *Tinker* there was a formally targeted ban from the very beginning, whereas the Madison County dress code is a facially neutral policy that is enforced, according to the students, in a content0 specific manner. If the students' claim is true, only certain ideological positions are barred from expression on school property. Based on the Supreme Court rulings in *Tinker, Mosley*, and *Rosenberger*, the school board cannot single out Confederate flags for special treatment while allowing other controversial racial and political symbols to be displayed."[72]

IV. Blending Religion Clause and Free Speech Analysis: *Chandler v. Seigelman*

A. *Chandler v. James*[73]

1. Facts–
    a. In 1996, an assistant principal in the DeKalb County (Alabama) public schools, Michael Chandler, filed suit alleging that the state's school prayer statute violated the Establishment Clause.
    b. This was the fourth moment of silent reflection statute passed by the Alabama legislature. Two previous statutes had been struck down in *Jaffee v. Wallace*.[74] The statute provided that "'[o]n public school, other public, or other property, non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benedictions, shall be permitted during compulsory or non-compulsory school- related student assemblies, school-related student sporting events, school- related graduation or commencement ceremonies, and other school-related student events.'"[75]
2. Holding–Alabama's school prayer statute was unconstitutional under the Establishment Clause because it violated all three prongs of the *Lemon* test.

B. *Chandler v. James*[76]

1. Facts--School officials and teachers in the Dekalb County (Alabama) public schools engaged in a wide variety of religious activities with students.
2. Permanent injunction issued
    a. Implementation of school prayer statute
    b. Administrators, staff, and faculty enjoined from
        (1) "Aiding, abetting, commanding, counseling, inducing, ordering, procuring, or permitting *school organized or officially sanctioned* religious activity in the classrooms of DeKalb County schools [or at school assemblies or school-sponsored events, whether voluntary or compulsory] *including, but not limited to:* vocal prayer; Bible and religious devotional or scriptural readings; distribution of religious materials, texts, or announcements; and discussions of a devotional/inspirational nature, regardless of whether the activity is initiated, led by, or engaged in by students."[77]
        (2) Participating in or encouraging graduation benedictions or invocations or listing religious activities or messages on commencement programs
        (3) Encouraging or permitting students, school employees, nonschool persons (including clergy) to use the school's public address system for prayer, scriptural readings, or the delivery of religious or devotional messages
        (4) Encouraging or permitting the distribution of religious literature, e.g., Gideon Bibles or religious tracts by school employees or non-school persons on school property or at school functions (although such materials could be placed in a common area if the district had a written policy)
3. Writ of mandamus ordering district to
    a. Promulgate a written policy regarding distribution of religious materials by outsiders
    b. Immediately provide a copy of injunction to Gideon's International
    c. Inform Gideon's International that
        (1) Students were not to be harassed regarding their acceptance or non-acceptance of Gideon Bibles.
        (2) Act in an aggressive manner toward students while they were on school property, including but not limited to, "throw[ing] or pass[ing] Bibles through the windows or doors of. . . school buses. . . ."[78]

BEST COPY AVAILABLE

d. Conduct mandatory staff development regarding the Religion clauses of the First Amendment
e. Submit names of three individuals to serve as monitors to ensure compliance with the court's order. Judge De Ment also specified the authority and powers of the monitor
4. Injunction did not apply to
a. Academic and objective use of religious materials in the classroom
b. Students' expression of their religious beliefs in school work
c. If school allows "non-religious expressive symbols and apparel," then clothing and display of religious symbols is also permitted.[79]
d. The religious activity of secondary school students during noninstructional time if consistent with Equal Access Act or "to quietly engage in religious activity during noninstructional times, *so long as it does not unduly call attention thereto and so long as it does not interfere with the rights of other students to freely pass thereby or to avoid its imposition upon themselves*". . . or to distribute religious material to their fellow students under the same limitations as secular material."[80]
e. Brief religious statements during commencement exercises or student addresses
f. The use of the public address system to announce information messages regarding the meetings and activities of noncurricular religious clubs

C. *Chandler v. James*[81] This proceeding concerned two motions. Both of which were denied.
1. A motion brought in state court to enjoin the implementation of Judge De Ment's previous orders which was denied as moot, in part because the state court motion was voluntarily dismissed by the plaintiffs, i.e., state of Alabama.
2. Motion to amend the court's October 1997 injunction
a. The court found that unconstitutional religious activities by school employees were pervasive.
b. School officials were likely to continue such activities given their previous propensity to disregard the decisions of federal courts concerning religious activities in public schools.
c. Indeed, the court noted that its March 1997 order had not been observed since it was entered.
d. The opinion of the court contains substantial evidence of continuing violations of Judge De Ment's orders. Several of which were addressed in a second opinion issued the same day.

D. *Chandler v. James*[82] The court held that the following activities were unconstitutional
1. Pre-game student or clergy led prayers at football games
2. Student led devotionals, including prayer, even "'nonreligious' devotionals ['words of inspiration'] that ended with a prayer" at school-sponsored events or delivered over the intercom system[83]
3. Student-led classroom devotionals and prayer, especially when teachers ask for or select students to give the prayer or devotional and/or teachers read aloud from the Bible without an academic purpose
4. Nonstudent distribution of Bibles and other religious materials during the school day and in the classrooms and presentations made by non-school persons in association with such distributions

E. *Chandler v. James*[84]
1. Denied state's request for stay of permanent injunction
2. Injunction was neither overbroad nor vague.

3. Provision of injunction permitting students to “quietly engage in religious activities during noninstructional time so long as it does not unduly call attention thereto” was not sufficiently narrowly tailored.
    a. Court pointed out these were twelve words out of a three-thousand, seven-hundred and fourteen word injunction.[85]
    b. Court noted that this language merely clarified that students permitted to engage in religious activities when such activities were “not officially sanctioned or coerced and [did] not infringe on the rights of others” consistent with *Tinker's* time, place and manner restrictions.”[86]
    c. However, the court warned that “inconsistent enforcement of school rules that work to favor religious conduct over other types of conduct may be construed as state promotion or indorsement of religion or a particular religion over other religions or non-religion.”[87]

F. *Chander v. James*[88]
1. Holdings
    a. Free speech and “freedom of expression” Clauses of the First Amendment require school district to “permit[ting] genuinely student-initiated religious speech in schools and at school-related events”did not violate the Establishment Clause.[89]
    b. Students' religious speech could not be supervised or prohibited by state but was subject to time, place, and manner restrictions
2. Reasoning/finding
    a. Establishment Clause violated only when government requires or compels religious speech
    b. The Constitution “affirmatively mandates accommodation [and] probably does not require a ‘wall’ [of separation] at all.”[90]
    c. Blends Free Speech and Religion Clause, especially Free Exercise, jurisprudence together
        (1) Beyond a brief acknowledgment that public schools are nonpublic fora the court engages in only a few lines of forum analysis in an opinion that rests heavily on the Free Speech Clause as a justification for forbidding school authorities from interfering in students' religious speech.[91]
        (2) The Free Exercise and Free Speech Clauses require that school officials permit student religious speech at the same time, and in the same place and manner as secular speech.”[92]
    d. Suppression of student religious speech in the injunction evinced hostility toward religion
    e. From Equal Access Act
        (1) State may not participate in nor supervise the speech
        (2) State may make reasonable time, place and manner restrictions
        (3) Proselytizing not permitted.
    f. “‘Cleansing’ our public schools of all religious expression, however, inevitably results in the "establishment" of disbelief--atheism--as the State's religion.”[93]
3. Comments–
    a. Questions
        (1) Is religion speech cleansed from our public schools when group prayer is prohibited?
        (2) Is atheism a religion (or just nonreligion, i.e. that which is not religious). What about agnosticism?

(3) Is that which is nonreligious ipso facto a religion/anti-religion.

(4) It is disingenuous for the court to

(a) Cast the injunction as prohibiting all student-initiated religious speech as it does constantly throughout its *Chandler* opinion, especially in the light of the substantial and increasing control that school officials exert over students' secular speech.

(b) State that the government is required to "'tolerate' atheistic views" and therefore, a student may chose to express his [or her] atheistic views. . . ."[94]

(c) Forbid the school from supervising students' religious while at the same time granting it the right to impose reasonable time, place, and manner restrictions. How would the school impose such restrictions unless it could supervise the speech? Don't schools supervise students' secular speech?

G. *Chandler v. Siegelman*.[95] Supreme Court vacated and remanded *Chander v. James*, 180 F.3d 1254 (11th Cir. 1999) in light of its holding in *Doe v. Santa Fe Independent School District* (district policy of permitting student-led and initiated prayers as determined by results of two-part election process at school-sponsored athletic events violated the Establishment Clause).[96]

H. *Chandler v. Siegelman*[97]

1. Holdings

a. Voluntary, student-initiated prayer is permissible notwithstanding Supreme Court's *Santa Fe* decision.

b. School personnel cannot apply any time, place, or manner restrictions on religious speech that they do not also place on nonreligious speech

2. Findings

a. Distinguishes *Santa Fe*[98]

b. Public address system (it is questionable whether the Supreme Court's decision in *Santa Fe* turned on the use of the school's public address system)

(1) Emphasis on Supreme Court's focus on the word "invocations"

(2) Under *Santa Fe* some religious speech is private

c. "The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets."[99]

3. Comments--This is very thin reasoning that basically says

a. This is fact pattern that is sufficiently different from *Santa Fe* (lack of entanglement, no use of public address system)

b. Here is our reasoning in *Chandler v. James*.

c. Therefore, we reaffirm.

d. Note that the *Chandler* court reaches contrary result from that of the *Muller* court regarding student religious speech despite the Eleventh Circuit's citation/reliance on *Muller* in *Denno*. The Eleventh Circuit cites neither *Muller* nor *West* in its *Chandler* opinion although it casts *Chandler*, in large part, as a free speech case.

4. Procedurally

a. Reversal of student prayer portion of injunction remains in effect

b. Eleventh Circuit's first *Chandler* decision reinstated, reaffirmed

V. Conclusion

A. Convergence of three trends in contemporary constitutional jurisprudence: neutrality principle in Establishment Clause jurisprudence, eliding of Establishment Clause and Free Speech analyses, especially when Free Speech is combined with Free Exercise Clause arguments, and diminution of students' constitutional rights generally.

B. “The ‘free exercise’ and ‘free speech’ rights of students do not trump the Plaintiffs' rights to be free of Establishment Clause violations.”[100]

C. Judge De Ment in denying the state’s motion to stay his October 1997 injunction noted that the state’s Attorney General’s perception of “an undue burden on free expression rights. . . and public interest factors” would preserve “the status quo” and the imposition of “majoritarian will,” and, in the case of *Chandler*, majoritarian views and majoritarian religion.[101]

D. When the courts command that religious speech be not proselytizing, is that not the government dictating the content of the people’s prayers?[102]

E. When school officials privilege certain types of speech, approved of the majority, by exempting them from suppression or supervision, are they not “prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion”?[103]

Notes

---

1. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969); See also *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 681 (1995) (“students do not ‘shed their constitutional rights ... at the schoolhouse gate’”), *Hazelwood Sch. Dist. v. Kulhmeier*, 484 U.S. 260, 266 (1988) (“students in the public schools do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”), *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986) (“This Court acknowledged in *Tinker v. Des Moines Independent Community School Dist.*, . . . that students do not ‘shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.’”), *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985) (In an often quoted statement, [this] Court said that students do not ‘shed their constitutional rights ... at the schoolhouse gate.’”). It is interesting to note that of the ten United States Supreme Court opinions in which this language appears, six are public school cases (*Tinker*, *Kulhmeier*, *Fraser*, *Pico*, *T.L.O.*, and *Acton*) and three of those six restricted students’ constitutional rights. Moreover, the statement does not appear in the Courts 2002 *Earls* decision (*Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 122 S.Ct. 2559 (2002) random urinalysis drug testing of students participating in extracurricular activities did not violate the Fourth Amendment) although the Tenth Circuit, striking down the random drug testing policy quotes *Tinker* in its *Earls* opinion (*Earls v. Board of Educ. of Tecumseh Public Sch. Dist.*, 242 F.3d 1264, 1275 (10th Cir. 2001) (“It is well established that. . . students do not “shed their constitutional rights ... at the schoolhouse gate’”).

2. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986).

3. *Hazelwood Sch. Dist. v. Kulhmeier*, 484 U.S. 260, 266 (1988) (“We have nonetheless recognized that the First Amendment rights of students in the public schools ‘are not automatically coextensive with the rights of adults in other settings’”), *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

4. *Tinker* at 503.

---

5. *Fraser* at 680.

6. *Kulhmeier* at 260.

7. *Chandler v McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir. 1992).

8 *Id.* at 527

9. *Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir.1993)

10. *Id.* at 1296.

11. *Id.* at 1296.

12. *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. of the Westside Cmty. Sch. Dist. v. Mergens*, 496 U.S. 226 (1990).

13. *Hedges* at 1300, citing *Lambs' Chapel v. Center Moriches Union Free Sch. Dist.* 508 U.S. 384, 390-94 (1993).

14. *Hedges* at 1300, citing *International Society for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 692-704 (1992).

15. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680 (1986); *Cohen v. California*, 403 U.S. 15 (1971).

16. *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir.1996).

17. *Id.* at 1535, citing *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion); *Muller* at 1538, quoting *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995).

18. *Muller* at 1536-1537, citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

19. *Muller* at 1539, citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683-85 (1986).

20. *Muller* at 1537, quoting *Hazelwood Sch. Dist. v. Kulhmeier*, 484 U.S. 260, 266 (1988).

21. *Muller* at 1537, quoting *Kulhmeier* at 267, citing *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 46 n.7 & 47.

---

22. *Muller* at 1538, quoting *Kulhmeier* at 267.

23. *Muller* at 1538.

24. *Id.* at 1538.

25. *Id.* at 1539, quoting *Cohen v. California,* 403 U.S. 15, 25 (1971); *Muller* at 1539, quoting *Veronia Sch. Dist. 47J v. Acton* 515 U.S. 646, 655, 656 (1995). Here, the Muller court ignores the fact that under *Fraser* schools have authority to ban *Cohen*-type speech.

26. *Muller* at 1540.

27. *Id.* at 1540.

28. *Id.* at 1541.

29. *Id.* at 1542, quoting *Hazelwood Sch. Dist. v. Kulhmeier*, 484 U.S. 260, 266 (1988); *Muller* at 1542.

30. *Id.* at 1542.

31. *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999), *aff'd on r'hrg sub nom., Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000); *Denno v. School Bd. of Volusia County*, 218 F.3d 1267 (11th Cir. 2000).

32. *West v. Derby Unified Sch. Dist. # 260*, 206 F.3d 1358 (10th Cir. 2000) (*West I*).

33. *West I* at 1225-31; *West v. Derby Unified Sch. Dist. # 260*, 206 F.3d 1358, 1362-63 (10th Cir. 2000) (*West II*).

34. *West II* at 1361, quoting Racial Harassment or Intimidation [Policy], 1995, n.p.

35. *West I* at 1225-31. *West II* at 1362.

36. *West I* at 1225-31; *West II* at 1363.

37. *West II* at 1361.

38. *West II* at 1366, quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505, 509 (1969).

39. *West II* at 1366.

---

40. *West I* at 1231.

41. The district court noted that even under *Tinker*, schools could ban speech if it threatened a material and substantial disruption of school discipline. *West I* at 1232, citing *Tinker* at 508.

42. *West I* at 1233.

43. *West II* at 1368.

44. *West I* at 1236.

45. *Denno v. School Board of Volusia County,* 218 F.3d 1267 (11th Cir. 2000).

46. *Id.* at 1271, citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)and *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).

47. *Denno* at 1272, quoting *Tinker* at 683. This begs the question of defining "civilized."

48. *Denno* at 1273.

49. *Id.* at 1273 n.4, quoting *West v. Derby Unified Sch. Dist. No. 260,* 206 F.3d 1358, 1366 (10th Cir.2000).

50. *Denno* at 1273.

51. *Id.* at 1272, quoting, *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995); *Denno* at 1272, citing *Fraser* at 681.

52 *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000).

53 *Id.* at 1092, 1097.

54 *Id.* at 1097.

55 It is very interesting that these "Christian" students attempted to deliver their speeches as written and stated "if anyone was offended they could leave the graduation." *Id.* at 1098.

56 *Id.* at 1101.

57 *Saxe v State College Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001).

58 *Id.* at 203.

---

59 *Id.* at 203.

60 *Id.* at 205.

61 *Id.* at 205.

62 *Id.* at 207.

63 *Id.* at 210.

64 *Id.* at 211.

65 *Id.* at 211.

66 *Id.* at 211.

67 *Id.* at 215.

68 *Id.* at 217, 218.

69 *Castorina v Madison County Sch. Bd.*, 246 F.3d 539 (6th Cir. 2001).

70 *Id.* at 539.

71 *Id.* at 540.

72 *Id.* at 540

73. *Chandler v. James*, 958 F. Supp. 1550 (M.D. Ala. 1997) (*Chandler I*). Decided Mar. 12, 1997.

74. *See Jaffree v. Wallace,* 705 F.2d 1526, 1535-36 (11th Cir.1983), *aff'd,* 472 U.S. 38 (1985); *Jaffree v. Wallace,* 705 F.2d 1526, 1535-36 (11th Cir.1983), *aff'd,* 466 U.S. 924 (1984).

75. *Chandler I* at 1553, quoting Ala. Code § 16-1-20.3(b) (1995).

76. *Chandler v. James*, 985 F. Supp. 1062 (M.D. Ala. 1997) (*Chandler II*). Decided Oct. 29, 1997.

77. *Id.* at 1063

78. *Id.* at 1065-66.

---

79. *Id.* at 1063.

80. *Id.* at 1063.

81. *Chandler v. James*, 985 F. Supp. 1068 (M..D. Ala. 1997) (*Chandler III*). Decided Nov. 12, 1997.

82. *Chandler v. James*, 985 F. Supp. 1094 (M..D. Ala. 1997) (*Chandler IV*). Decided Nov. 12, 1997.

83. *Chandler IV* at 1099-1100.

84. *Chandler v. James*, 998 F. Supp. 1255 (M..D. Ala. 1997) (*Chandler V*). Decided Dec. 17, 1997.

85. *Chandler V* at 1272.

86. *Id.* at 1272.

87. *Id.* at 1272.

88. *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999) (*Chandler VI*).

89. *Chandler VI* at 1254.

90. *Chandler VI* at 1262; *Chandler VI* at 1262 n.12.

91. *Chandler VI* at 1262.

92. *Chandler VI* at 1260.

93. *Chandler VI* at 1262 n.11.

94. *Chandler VI* at 1261.

95. *Chandler v. Siegelman*, 530 U.S. 1256 (2000).

96. *Doe v. Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (2000).

97. *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000).

98. *Doe v. Santa Fe Indep. Sch. Dist.*, 530 U.S. 290 (2000).

---

99. *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000).

100. *Chandler v. James*, 998 F. Supp. 1255, 1272.(M..D. Ala. 1997).

101. *Id.* at 1255, 1264.

102. *Engel v. Vitale*, 370 U.S. 421 (1962).

103. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Protected Classroom Speech of Public School Teachers:
Pickering and Its Progeny*

Ronald T. Hyman, Esq.
Graduate School of Education
Rutgers University
New Brunswick, N.J. 08901-1183
(732) 932-7496, Ext. 8223; Fax (732) 932-6803
rhyman@rci.rutgers.edu

*Paper prepared for the 48th Annual Conference of the Education Law Association, "Balancing Rights: Education Law in a Brave New World," New Orleans, Louisiana, November 14-16, 2002.

The concept of academic freedom, the concept that constitutes the theoretical underpinning in suits brought by teachers who oppose retaliation by boards of education for what teachers have said or done, originated in situations related to higher education. Only decades after academic freedom became broadly accepted as protection for professors did public school teachers seek to apply to themselves what the courts had yielded to professors as scholars and researchers.[1] Although academic freedom may apply to professors, as somewhat autonomous scholars within their specific disciplines in a university setting, it is far from clear to what extent, and even why, academic freedom applies to classroom K-12 teachers.

In this paper I shall treat the balancing of teacher and school district rights in suits brought by teachers who have claimed that their school districts have retaliated against them, thereby violating the teachers' First Amendment academic freedom rights. I shall utilize the most recent, but not final, decision in *Cockrel v. Shelby County School District* (*Cockrel II*)[2] as an excellent example of the K-12 academic freedom cases that follow the *Pickering v. Board of Educ.*[3] line of analysis. I shall also offer commentary on the topic at hand, including my idea about what is the primary policy issue on K-12 public school teachers' in-class free speech.

I. Setting Today's Context for Teachers' In-Class Free Speech Claims[4]

Despite the many Supreme Court cases dealing with claims by plaintiffs that their speech deserved constitutional protection under the First Amendment provision that "Congress shall make no law ... abridging the freedom of speech," the Supreme Court has not yet dealt directly with the claims that in-class speech of public school teachers deserves constitutional protection. Therefore, the lower courts, at both the district level and the appellate level, must rely on Supreme Court decisions that are in one way or another off-point when they deal with in-class free speech claims. Some courts have relied on *Tinker v. Des Moines Indep. Sch. Dist.*,[5] which focused on in-school student speech about the controversial issue of support for the war in Vietnam.[6] In *Tinker* the Court ruled that the students' armband speech was protected. The Court declared, but did not specify anything regarding teachers, that

> First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.[7] (emphases added).

Even though the Court recognized that teachers do have First Amendment rights, the application of *Tinker* to cases involving teacher rights has not been widespread. The key standard that the Court supported deals with disruption in a school. To prohibit an expression of opinion the school must show that the "forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline." (citation omitted).[8]

Most courts have relied on either *Pickering,* as clarified substantively primarily by *Connick v. Myers*[9] 15 years later, or *Hazelwood Sch. Dist. v. Kuhlmeier*[10]. *Pickering* dealt with a teacher's out-of-class speech when he wrote to a local newspaper criticizing his board of education and superintendent for the way they "had handled past proposals to raise new revenue for the schools."[11] The Court ruled that teacher Marvin Pickering's speech was constitutionally protected because that speech dealt with a matter of general public interest. In balancing Pickering's interest "as a citizen in commenting upon matters of public concern" with the school district's interest "as an employer in promoting the efficiency of the public services it performs through its employees," the Court ruled that Pickering's interest was greater than the school district's.[12]

Connick dealt with the actions of Sheila Myers, an Assistant District Attorney in New Orleans, who distributed a questionnaire to "her fellow staff members concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." District Attorney Harry Connick fired Myers because Myers refused to accept a transfer within the D.A.'s office and because Connick considered "the distribution of the questionnaire as an act of insubordination."[13]

In considering Myers's suit claiming protected free speech, the Supreme Court clarified *Pickering* on two points. First, the Court clarified the definition of matters of public concern to be those that can be "fairly considered as relating to any matter of political, social, or other concern to the community."[14] Second, the Court declared that, in deciding whether an employee's speech addresses a matter of public concern rather than a matter of personal interest, a court must look at the "content, form, and context of a given statement, as revealed by the whole record.[15] Based on these clarifications the Court supported the government rather than Myers when it performed the "*Pickering* balance" of the parties' interests.[16]

The other Supreme Court decision on which some lower courts have relied is *Hazelwood School Dist. v. Kuhlmeier.*[17] *Hazelwood* dealt with the claim brought by student editors of the high school newspaper that Principal Robert Reynolds violated their First Amendment free speech rights. The principal removed two pages from the school-supported newspaper, *Spectrum*, before it went to press. The Court held that the newspaper was not a public forum but a component of the school's curriculum. (*Spectrum* was written and edited by students in a course entitled Journalism II.) Hence, readers of the newspaper "might reasonably perceive [it] to bear the imprimatur of the school."[18] The Court established a test for the limitation of the students speech: school officials may regulate school sponsored student speech and expression as long as their "actions are reasonably related to legitimate pedagogical concerns."[19]

Both *Pickering* and *Hazelwood* have a limited relationship to teacher in-class free speech lawsuits in that the former deals with teacher out-of-class speech as a citizen and the latter deals with student speech in school-sponsored activities. Neither precedent deals directly with teacher in-class speech. Thus, no Supreme Court case exists that covers the dynamic triadic classroom relationships that exist among teacher, student, and the curriculum.

One result of the limited relationship of current Supreme Court decisions is that at this time there is no agreement among the appellate courts as to which Supreme Court decision, *Pickering* or *Hazelwood*, should guide the lower courts' examinations of teacher in-class controversies or whether either should do so. The split among circuits appears to be as follows:[20] the Third, Fourth, Fifth, Sixth, Ninth, and District of Columbia Circuits use *Pickering*;[21] the First, Second, Seventh, Eighth, Tenth, and Eleventh use *Hazelwood.*[22]

The split among circuits means that *Pickering* and *Hazelwood* lead the judges to undertake different analytical approaches as they deal with teacher free speech cases. *Pickering* leads judges to decide whether the plaintiff teacher's action constitutes speech, whether the speech is protected in that it was on a matter of public concern, and whether the teacher's interest as a citizen outweighs the school board's interest as the employer. If all of these questions are answered Yes, then the defendant school board must show that it would have penalized the teacher in any case. On the other hand, *Hazelwood* leads the judges to decide, first, whether the plaintiff teacher's action, which qualifies as speech, is curricular and, second, whether the defendant school board's punishment for that speech is reasonably related to legitimate pedagogical concerns. In essence, then, the split among the appellate courts today centers on which analytic test to apply to disputed speech.

The various decisions by the lower courts indicate that neither *Pickering* nor *Hazelwood* offers much protection to teachers in spite of the rhetoric of the Supreme Court and the lower courts about the centrality of academic freedom to the education of students living in a dynamic democracy. Recall the timely and deservedly oft-quoted statement in *Keyishian v. Board of Regents*:

> Our Nation is deeply committed to safe-guarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore of a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, [364 U.S. 479,487 (1960)]. The classroom is peculiarly the "marketplace of ideas."[23]

While most courts currently rely on *Pickering* or *Hazelwood* when deciding on a plaintiff teacher's claim of violation of academic freedom under the First Amendment, some other courts rely mainly on yet another approach. That is, whether with or without a grounding in the substantive First Amendment right of free speech, some courts primarily take a Fourteenth Amendment procedural route. These courts ask whether the teacher had notice from the school board that the teacher's speech fell into the category of prohibited speech. Two First Circuit cases stand out as the chief exemplars of the procedural approach to academic freedom disputes.

In *Keefe v. Geanakos*[24] a tenured high school teacher of English, Robert Keefe, discussed an article that appeared in the September, 1969 issue of Atlantic Monthly magazine with his students. The article, written by Robert Lifton, a psychiatrist and professor at a noted medical school, included a "dirty" word, which the court described as, "admittedly highly offensive [and] is a vulgar term for an incestuous son."[25] The court, after questioning the school board's action on substantive grounds, said, "We believe it equally probable that the plaintiff will prevail on the issue of lack of any notice that a discussion of this article with the senior class was forbidden conduct."[26]

The second case, *Ward v. Hickey*,[27] dealt with a nontenured biology teacher, Toby Klang Ward, whose contract was not renewed after "a discussion in Ward's ninth grade biology class concerning abortion of Down's Syndrome fetuses."[28] Although the court ultimately did not support Ward on technical grounds, the court did find that "a school committee may regulate a teacher's classroom speech if: (1) the regulation is reasonably related to a legitimate pedagogical concern...; and (2) the school provided the teacher with notice of what conduct was prohibited...."[29]

Keefe and *Ward*, though precedent only in the First Circuit, have served to support an array of claims of retaliation by school boards from around the country. One excellent example of a court relying on notice to teachers is *Cowan v. Strafford R-VI School Dist.*,[30] a case more well known as "The Magic Rock" case than by its official name. In *Cowan* the district court judge took a simple approach. First he stated that the Supreme Court in *Keyishian* recognized academic freedom as a special concern of the First Amendment. He then quoted from *Ward*, stating that local boards of education may proscribe certain speech provided they communicate their decisions to teachers. He went on to find that the Magic Rock letter sent by Cowan to her second grade students was properly classified as classroom speech and that Cowan's school district "could not reasonably expect Cowan to know that references to magic were prohibited."[31] At trial the jury subsequently found in favor of Cowan's First Amendment claim even though she was a probationary, nontenured teacher without a Fourteenth Amendment property right derived from being tenured. (Earlier the judge had declared in his denial of summary judgment to the defendant school board that "classroom speech related to classroom activity or curriculum made by a teacher is protected speech unless the teacher knows what speech is prohibited.")[32]

Thus, courts have agreed that teachers deserve some notice that certain conduct is prohibited and that it is unreasonable for the school to expect teachers to know, without notice, what is proscribed. The due process requirement of the Fourteenth Amendment applied to teacher in-class speech cases comes to support academic freedom claimed under the First Amendment.

With the conclusion of this brief presentation of today's legal context for examining the in-class free speech claims of public school teachers, let us turn now to an ongoing case that has the potential to become the cause celebre that will be used by the Supreme Court to set forth its views on in-class teacher speech.

II. *Cockrel*[33]

Donna Cockrel was a tenured fifth grade teacher in Shelby County (KY) School District. The School District dismissed Cockrel on July 15, 1997, listing 17 specific instances of misconduct amounting to insubordination, conduct unbecoming a teacher, inefficiency, incompetency, and neglect of duty. Cockrel filed suit, however, claiming that the District dismissed her in violation of her "First Amendment right of speech when discussing the potential environmental benefits of industrial hemp" as an alternative fiber source to wood pulp in making paper. Cockrel had on two occasions invited actor Woody Harrelson into her classroom to speak about industrial hemp, an illegal substance in Kentucky.

The district court[34] granted the District's motion for summary judgment on Cockrel's First Amendment retaliation claim. Citing *Connick*, the court held that Cockrel's selection of industrial hemp as part of her unit on Saving The Trees was not protected speech but private speech in her role as an employee. The court also held that Cockrel's conduct was not expressive speech and did not send a "particularized message," citing *Spence v. Washington*.[35] Thus, because Cockrel had no protected First Amendment right to speak, the district court ruled that Cockrel had no retaliation claim. Cockrel then appealed to the Sixth Circuit Court of Appeals.

The appellate court reviewed de novo the district court's grant of summary judgment to the defendant school district. The appellate court's decision, *Cockrel II*, is a classic, casebook example of a *Pickering* analytic approach to a teacher's in-class free speech claim. It deserves attention not only as an indication of the court's substantive position but equally as a description of the *Pickering* multi-step approach.[36] (As I prepare this paper in the summer of 2002, the defendants in that case have filed a petition for certiorari with the Supreme Court. Cockrel has just filed her response to the petition. Therefore, *Cockrel II* might become the long-awaited case that the Supreme Court will use to speak directly for the first time on teacher in-class free speech rights in the K-12 public schools.)

Step 1. Was Cockrel's activity speech? Citing two Supreme Court decisions,[37] the court recognized that Cockrel did not generate her own ideas on industrial hemp but invited outside speakers to advocate the use of that plant as an alternative to wood pulp. The court ruled that Cockrel's conduct, like that of newspaper and cable television operators, was a form of speech. Thus, according to the appellate court, the district court erred on this point as to what qualifies as speech.

Step 2. Is Cockrel's Speech Constitutionally Protected? To answer this question the court broke the issue into two parts, each part is required to be answered in the affirmative in order to label Cockrel's speech as protected.

Step 2A. Does Cockrel's Speech Touch on a Matter of Public Concern? Relying on the *Connick* modification of *Pickering,* which set the boundaries of what is a matter of public concern, the court held that there was "no question" that the issue of industrial hemp was "a matter of great political and social concern to many citizens of Kentucky."[38]

Step 2B. In Light of a *Pickering* Balancing of Interests, Does Cockrel's Interest in Speaking on Industrial Hemp Outweigh the School District's Interest in Promoting the Efficiency of Its Public Services? Citing *Pickering* and *Leary v. Daeschner,*[39] which quoted *Pickering*, the court ruled after balancing the parties' interests that, "on balance, the defendants' interests in an efficient operation of the school and a harmonious workplace do not outweigh the plaintiff's interest in speaking about the benefits of industrial hemp, an issue of substantial political and economic concern in Kentucky."[40] Thus, Cockrel's speech was deemed to be constitutionally protected.

Step 3. Did Cockrel Suffer an Injury as a Result of Her Speech That Would Chill an Ordinary Person from Continuing to Engage in Such Speech? Citing *Leary* as precedent for its circuit, the court quickly and simply answered this question in the affirmative, too.

Step 4. Was the Decision to Terminate Cockrel Motivated, at Least in Part, by Cockrel's Decision to Speak About Industrial Hemp? The court relied on *Bailey v. Floyd County Bd. of Educ.* to set up the criterion for Cockrel to meet: "the employee must link the speech in question to the defendant's decision to dismiss her."[41] The court held that Cockrel had presented enough evidence that "a reasonable jury could find that the defendants, in terminating her, were at least partially motivated by her decision to speak on industrial hemp."[42]

Step 5. Did the School District Present Evidence Such That Every Reasonable Juror Would Conclude That the District Has Met Its Burden of Showing That Cockrel Would Have Been Terminated Even Had She Not Spoken to Her Class About the Merits of Industrial Hemp? This question deals with the burden of proof set for the District after Cockrel had met her burden of proof in a claim of First Amendment retaliation. Did Cockrel demonstrate that she had established her retaliation claim? In other words, did the court rule in Cockrel's favor in Steps 1, 2A, 2B, 3, and 4? The court did so rule in the prior steps.

Therefore, because this situation dealt with summary judgment, the court decided that the defendant had the heavy burden to show that "*every*"[43] (emphasis in original) juror would decide in its favor. This is a heavier burden than the burden the District would have to meet when facing a jury during a trial on the merits of the case. To rule in favor of the District the court held that it had to be "confident that the defendant's decision to terminate the plaintiff was not based in part upon the plaintiff's decision to speak."[44] The court ruled that it was not confident in this regard. The court then reversed the district court's grant of summary judgment and remanded the case to the district court to resolve the factual issues at trial rather than decide the case at the summary judgment stage. In sum, the Sixth Circuit supported Cockrel only to the extent that she deserved a trial. Cockrel still might lose on the merits of the case if a trial does take place.

III. Commentary

The issue concerning the in-class free speech rights of public school teachers is unsettled at this time. It is unsettled in part nationally because the Supreme Court has never ruled substantively on a case dealing with a teacher's claim of violation of First Amendment in-class free speech rights. The Court has dealt with in-school student rights (*Tinker*, *Bethel School Dist. No. 403 v. Fraser*,, and *Hazelwood*) and out-of-school teacher rights (*Pickering*) but not with in-class teacher rights. Perhaps the Court will establish new law and bring order to this constitutional matter if it does grant certiorari to the Shelby County School District. On the other hand, it might remand the case for trial only with some procedural instructions, as it did in *Mt. Healthy*. Thus, the Court might just be waiting to enter the academic freedom fray, waiting until the case percolates up to it again after lower court decisions on the merits of the case based on a full array of adjudicated facts and interpretations.

If the Court denies certiorari, matters will continue to remain unsettled nationally on such questions as: What is the Court's view on the concept of academic freedom as it concerns K-12 public school teachers? Given that there is no direct, on-point Supreme Court decision to guide the lower courts, what analytic approach should judges employ when deciding a K-12 teacher's free-speech claim? To what extent is the role of a teacher to inculcate fundamental values, and to what extent is it to teach critical thinking in the marketplace of ideas? Is there some way to lower the tension between a board of education and the teachers who object to tight control of in-class speech?

With the exception of the point regarding Cockrel's ex post facto loss of her teaching certificate even before the Superintendent of Schools sent his letter terminating Cockrel's employment,[45] I believe that *Cockrel II* is a clear and well-reasoned analysis of law. The majority and concurring opinions did not comment on the apparent significance of the fact that Cockrel lost her teaching certificate for four years (decided on March 11, 1999, but effective retroactively as of June 30, 1997). The loss of Cockrel's certificate predates the termination of Cockrel's employment (July 15, 1997). That is, it appears that the loss of employment is a most important issue because Cockrel could not have been employed any longer by the School District in any case. The District has raised this point in its petition for certiorari. However, the District could not have known in July of 1997 about the 1999 surrender and suspension of Cockrel's certificate. It is not clear at all why *Cockrel II* did not deal with this matter clearly. Nor is it clear at this point in time how the Supreme Court will react to this wrinkle in Cockrel's set of facts.

In any case, the Sixth Circuit may have made a more serious and damaging error. In justifying its decision the court noted that there are differences within the *Pickering* group of circuits. (This is not the conflict among the circuits that is discussed in the legal literature, which is between the application of *Pickering* rather than *Hazelwood*.) The Sixth Circuit referred to its disagreement with the Fourth and Fifth Circuits regarding the intent of the Supreme Court in *Connick*. The Sixth Circuit believes that the Fourth and Fifth Circuits interpreted *Connick* to mean that anything a plaintiff said while speaking as an employee would be unprotected speech. Yet the Supreme Court ruled that one part of Myers's questionnaire in *Connick* was protected speech because it did deal with a matter of public concern, namely, the pressure on an assistant district attorney to work in political campaigns.[46] All in all, the Court held that Myers's questionnaire "touched upon matters of public concern in only a most limited sense."[47] Based on the statement by the Supreme Court about Myers's questionnaire, the Sixth Circuit decided correctly, I believe. Cockrel's speech on industrial hemp deserved protection because it dealt mainly, not in "a most limited sense," with a matter of public concern.

In regard to the intra-*Pickering* conflict, the Sixth Circuit wrote, "We believe that the Fourth and Fifth Circuits have extended the holding of *Connick* beyond what the Supreme Court intended....The facts of *Connick* indicate that Fourth and Fifth Circuits have read the Supreme Court's language too broadly."[48] This comment may have piqued the interest of the Supreme Court to review *Cockrel II*, perhaps ultimately to the disadvantage of the Sixth Circuit. The Sixth Circuit easily could have avoided commentary on its disagreement with the other two circuits. It could have held to its conclusion without referring to the decisions in the other circuits since those decisions do not serve as precedent in the sixth circuit anyhow.

Despite the attention in the legal literature given to the split of the appellate circuits in regard to the use of *Pickering* or *Hazelwood* as the preferred Supreme Court precedent for analyzing a public school teacher's free-speech claim, I believe that the split between the circuits is actually of secondary concern. Either *Pickering* or *Hazelwood* will allow judges sufficient analytic leeway to support a given decision. For example, Judge Motz in *Boring* used *Hazelwood* to support her panel's decision in favor of plaintiff Boring.[49] However, when the en banc Fourth Circuit applied *Pickering* to reverse her panel's decision, Judge Motz pointed out that Boring herself and the two school board associations supporting the Buncombe County school board preferred *Hazelwood*. The judge then went on in her dissent in *Cockrel II* to apply *Connick* to support Boring's complaint again.[50] Thus, in *Boring* both *Pickering* and *Hazelwood* served the majority and the dissent in supporting their positions. In *Cockrel II*, although the majority used only *Pickering*, it acknowledged that other circuits use *Hazelwood*, but it never criticized *Hazelwood* nor stated that *Pickering* was superior. It only stated that *Pickering* was used "consistently" in the Sixth Circuit.[51]

Having said that the split in circuits constitutes only a secondary issue in dealing with teachers' in-class free speech, I shall turn to what I consider the major issue. The Supreme Court has stated explicitly in *Bethel* that it believes that the role and purpose of the public school system is inculcative. The public schools

> "must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practice of self-government in the community and the nation." [citations omitted]....we echoed the essence of this statement of the objectives of public education as the "inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system."[52]

I call attention to the deliberate use of inculcate rather than teach as the key verb of action to be performed by teachers because the Court refers to the main objective of public education. Though the staff members are commonly called teachers, their job is fundamentally to inculcate.

Furthermore, the Court pointed out in *Milliken v. Bradley* that schools are under the close supervision of local citizens:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.... [L]ocal control over the educational process affords citizens an opportunity to participate in decision making....[53] [citations omitted].

Added to this situation that involves the inculcation of values as the objective of public education, which is under local control, is the double recognition that (1) academic freedom, the key concept supporting teacher in-class free speech, derives from efforts to protect university professors who are concerned with challenging current knowledge and creating new knowledge and (2) faculty members in the public schools have a quite different job description from university professors. In deciding *Mailloux v. Kiley*,[54] a K-12 academic freedom case, Judge Wyzanski explicitly pointed out a series of essential differences between the university model of education and the public high school model of education. Among other differences the judge correctly noted, "Most parents, students, school boards, and members of the community usually expect the secondary school to concentrate on transmitting basic information, teaching 'the best that is known and thought in the world,' trained by established techniques, and, to some extent at least, indoctrinating in the mores of the surrounding society."[55] It is on this basis that Yudof, in his insightful examination of the concept of academic freedom, states that there is an "ill fit" between academic freedom in universities and the public schools and that in general the early, notable attempt to apply academic freedom to the public schools [that is, *Parducci*] "never became the law of the land."[56]

Given the combination of factors mentioned above — role and purpose of the public schools, close control of public schools by local citizens, and the concept of academic freedom being an ill-fit with the public schools — I believe that the essential issue in K-12 academic freedom situations involves a pair of related questions: (1) To what extent will local boards of education moderate their tight control of their schools so as to create greater leeway for their teachers? (For example, to what extent will a board allow a 22-year old just-out-of-college teacher to determine what books the students will read, what films the students will view, and what topics the students will discuss under the label of in-class academic freedom? To what extent will a local board allow a senior tenured teacher to supplement course approved reading lists, film lists, and topics for discussion?) (2) To what extent will the Supreme Court support local boards of education when they exercise their control, tight or moderated, over teacher speech and the curriculum that they have set for their students?

Recall here the Supreme Court's pronouncement in *Bethel* regarding the power of the local school boards, "The determination of what manner of speech in the classroom or in school assembly is appropriate properly rests with the school board."[57] While some university scholars might argue with the Supreme Court on this point about control in regard to the university, virtually everyone involved with K-12 education, except some teachers, agrees with board control of the K-12 classroom.

The primary issue, then, is not whether *Pickering* or *Hazelwood* applies in any given case because both offer much leeway to presiding judges to frame their decisions. The criteria generated by *Pickering* and *Hazelwood* for guiding judges in deciding future cases appear to be so elastic as to allow for diverse interpretations, especially when applied to situations of teacher in-class speech. To put it another way, the criteria of "reasonably related to legitimate pedagogical concerns," "matters of public concern," "the content, form, and context of the speech," and the "balancing of the teacher's interest as citizen with the government's interest as employer" offer such a wide latitude of interpretation that they can serve to support virtually any judge's particular view of the current scenario before the bench. In this way, *Pickering* and *Hazelwood* are amazingly applicable in that defendant boards of education, plaintiff teachers, and judges can rely on them legally to support whichever positions they advocate in a case at bar.

Just as judges need some leeway to decide court cases and just as board of education need some leeway to operate their schools, teachers need some leeway as they teach because teachers are not robots whose speech can be programmed ahead of time and because a teacher-proof curriculum cannot be designed so that it will be transmitted precisely and correctly all the time.[58] Judge Logan in *Cary v. Bd. of Educ.*[59] put it succinctly and wisely when he wrote, "We think teachers do have some rights to freedom of expression in the classroom, teaching high school juniors and seniors. They cannot be made to simply read from a script prepared or approved by the board."[60] This remark, I believe, applies to all K-12 teachers and not just to teachers of juniors and seniors. We must recognize that a tension exists between the local board's control and a teacher's desire and professional commitment to go beyond inculcation. A teacher rightly needs to open up the classroom to creative and critical thinking in the spirit of making the classroom a marketplace of ideas, so as to motivate students and to promote the preparation of students to participate fully in a democratic government.[61]

IV. Conclusion

Boards of education, as well as professional educators' organizations, must continuously discuss the tension between appropriate board (that is, community) control and appropriate teacher fostering of diverse viewpoints. The results will be several. By way of ongoing professional in-service discussions teachers will become sensitive to legitimate issues in their communities. They will also become notified about legitimate local proscriptions. Teachers will be able to avoid potential penalties; boards will be able to minimize future lawsuits; teachers will be able to teach without always looking over their shoulders; and all parties involved in education will be able to clarify their thoughts about some critical matters in our society. Judge Torruella in *Ward* was correct in reminding everyone that:

> Few subjects lack controversy. If teachers must fear retaliation for every utterance, they will fear teaching. As the Supreme Court warned us in *Keyishian*, 385 U.S. at 604, 87 S.Ct. at 684, "[t]he danger of that chilling effect upon the exercise of vital First Amendment rights must be guarded against by sensitive tools which clearly inform teachers what is being proscribed."[62]

In sum, I believe that the split among the circuits as to whether *Pickering* or *Hazelwood* is the appropriate precedent for adjudicating claims of violation of public school teachers' free speech is of secondary importance. To a lesser extent so is the call by some critics for a new Supreme Court decision.[63] We need to concentrate our efforts on the prevention of lawsuits, recognition of the current power of local school boards, and the promotion of understanding by all parties concerned, including board members, parents, students, teachers, and community members, about the nature of classroom teaching within and for a democratic society. The presence of fear rather than trust impedes everyone involved in education for a democracy. The search for a legal decision from the Supreme Court to the primary issue concerning in-class free speech will not lead to a solution that of necessity must involve a combination of educational, political, and legal aspects. This is true of all cases dealing with the eternal conflict between government rights and individual rights, of which the issue of teacher in-class free speech is but one part. A solution to this particular educational policy issue concerning teacher in-class free speech must inevitably involve adjustments by all parties. Free speech in the classroom is too important an issue to be left solely to any legal body, including the Supreme Court.

Endnotes

1. For an examination of the history and types of academic freedom see Mark G. Yudof, *Three Faces of Academic Freedom*, 32 Loyola L. Rev.831 (1987).

2. *Cockrel v. Shelby County School Dist.*, 270 F. 3d 1036 (6th Cir. 2001). (*Cockrel II.*)

3. *Pickering v. Board of Educ.*, 391 U.S. 563 (1968).

4. For anyone who wishes to read in depth about the many court decisions as well as some relatively recent reviews of the literature on this topic, I recommend the following lengthy and detailed journal articles: G.A. Clarick, *Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. Rev. 693 (1990); K.C.Daly, *Balancing Act: Teachers' Classroom Speech and the First Amendment*, 30 J.of Law & Educ. 1 (2001); W.S. Stuller, *High School Academic Freedom: The Evolution of a Fish out of Water*, 77 Neb. L. Rev. 301 (1998); M.H. Weiner, *Dirty Words in the Classroom: Teaching the Limits of the First Amendment*, 66 Tenn. L. Rev. 597 (1999); and K.G. Welner, *Locking up the Marketplace of Ideas and Locking out School Reform: Courts' Imprudent Treatment of Controversial Teaching in America's Public Schools*, 50 UCLA L. Rev., (in press, issue #4, April, 2003).

5. *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969)

6. See, for example, *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala., 1970).

7. *Tinker*, 393 U.S. at 506.

8. *Id.* at 509, quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

BEST COPY AVAILABLE

9. *Connick v. Myers*, 461 U.S. 138 (1983).

10. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

11. *Pickering*, 391 U.S. at 564.

12. *Id.* at 568.

13. *Connick*, 461 U.S. at 141.

14. *Id.* at 146.

15. *Id.* at 147-48.

16. The Supreme Court also clarified *Pickering* in two other cases. The points clarified in those cases are not primary here. In *Mt. Healthy City Board of Educ. v. Doyle*, 429 U.S. 274 (1977) the Court established a process for deciding a claim that has a mixed set of factors. In *Givhan v. Western Line Consolidated School Dist.*, 439 U.S. 410 (1979) the Court decided that First Amendment protection applies even when a public employee confers privately with the employer rather than expressing her views in public.

17. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

18. *Id.* at 271.

19. *Id.* at 273.

20. This breakdown originally appears in Weiner, supra, at 625-627 and Daly, supra, at 16-17. For citations of the leading cases for each circuit see Daly at 16.

21. See, for example, *Boring v.Buncombe County Bd. of Educ.*, 136 F.3rd 364 (4th Cir. 1998).

22. See, for example, *Lacks v. Ferguson Reorganized School Dist. R-2*, 147 F. 3rd 718 (8th Cir. 1998).

23. *Keyishian v. Board of Regents*, 385 U.S. 589,603 (1967).

24. *Keefe v. Geanakos*, 418 F. 2d 359 (1st Cir. 1969).

25. *Id.* at 361.

26. *Id.* at 362. See also (1) *Mailloux v. Kiley*, 436 F. 2d 565,566 (1st Cir. 1971), where the court referred to its prior decision in *Keefe*; and (2) *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala., 1970), where the judge cited Supreme Court First Amendment decisions in *Tinker*, *Keyishian*, *Sweezy v. New Hampshire*, 354 U.S. 234 (1957), *Shelton v. Tucker*, 364 U.S. 479 (1960), and *Wieman v. Updegraff*, 344 U.S. 183 (1952); the *Parducci* court also cited *Keefe*.

27. *Ward v. Hickey*, 996 F. 2d 448 (1st Cir. 1993).

28. *Id.* at 450.

29. *Id.* at 452 (citations of *Hazelwood* and *Keyishian* omitted).

30. *Cowan v. Strafford R-VI School Dist.*, No. 94-3217-CV-S-4, 1995 U.S. Dist. Ct. (W. Mo., June 14, 1995), slip op. (order denying summary judgment for defendants) *aff'd*, 140 F. 3d 1153 (8th Cir. 1998).

31. *Id.* at 8.

32. *Id.* at 7.

33. Facts derive from the federal district and appellate court decisions, from the briefs of the parties, and from other court documents.

34. *Cockrel v. Shelby County School Dist.*, 81 F. Supp. 2d 771 (E.D. Ky. 2000). (*Cockrel I*).

35. *Spence v. Washington*, 418 U.S. 405, 411 (1974). *Spence* involved the prosecution of a man who displayed an American flag upside down with a peace symbol taped to it to send the message that America stood for peace. Spence was protesting the then-recent actions in Cambodia and the fatal events at Kent State University in Ohio. The Supreme Court held in favor of Spence, reversing the State of Washington Supreme Court conviction and holding that the Washington statute "contravened the First Amendment" and "impermissibly infringed protected expression." *Id.* at 406.

36. I shall restrict my description of *Cockrel II* to the First Amendment claim though other, procedural elements of the case also exist.

37. *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group*, 515 U.S. 557,570 (1995) and *Schad v. Borough of Mount Ephraim*, 452 U.S. 61,65 (1981).

38. *Id.* at 1051.

39. *Leary v. Daeschner*, 228 F. 3d 729, 737 (6th Cir. 2000).

40. *Cockrel II*, 270 F. 3d at 1055.

41. *Bailey v. Floyd County Bd. of Educ.*, 106 F. 3d 135, 145 (6th Cir. 1997).

42. *Cockrel II*, 270 F. 3d at 1056.

43. *Id.* at 1057.

44. *Id.* at 1059.

45. The superintendent's letter terminating Cockrel's employment is dated July 15, 1997. By written agreement between Cockrel and the Kentucky Education Professional Standards Board on March 11, 1999 Cockrel's teaching certificate was voluntarily surrendered for two years retroactive to June 30, 1997 and suspended for two years from July 1, 1999 through June 30, 2001. (Photocopies of the Termination Letter and the Agreed Order given to me by the District's attorney.)

46. *Connick*, 461 U.S. at 149.

47. *Id.* at 154.

48. *Id.*

49. *Boring v. Buncombe County Bd. of Educ., 98 F.3rd 1474* (6th Cir. 1996).

50. *Boring*, 136 F. 3d at 377-379.

51. *Cockrel II*, 270 F. 3d at 1055.

52. *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 681 (1986), quoting historians C.Beard and M. Beard and then *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1079).

53. *Milliken v. Bradley*, 418 U.S. 717, 741-742 (1974).

54. *Mailloux v. Kiley*, 323 F. Supp. 1387 (D. Mass. 1971), aff'd mainly on lack of notice rather than on right to academic freedom, 448 F. 2d 1242 (1st Cir. 1971).

55. *Id.* at 1392.

56. Yudof, *supra*, at 844-846.

57. *Bethel*, 478 U.S. at 683.

58. Consider the fate of the many curriculum reform packages, especially those of the 1960s and 1970s, that were designed by university experts to teach the new social studies, the new biology, the new physics, and the like. The experts' conception of the role and function of pre-packaged curriculum units was way off the market. These experts initially held the belief that they could design a teacher proof curriculum. They failed, of course. What success the reformers then had, however, was directly related to their subsequent inclusion of classroom teachers into the reform process. The reform projects abandoned the idea that teachers are mere consumers and implementers of the knowledge and wisdom of university experts.

59. *Cary v. Bd. of Educ.*, 598 F. 2d 535 (10th Cir. 1978).

60. *Id.* at 543.

61. Some troublesome teacher remarks do not reflect professional commitment to discuss issues. Some comments are merely inadvertent or are attempts to control the classroom without much thought of alternatives or the rights of the duly elected or appointed board of education.

62. *Ward*, 996 F. 2d at 453.

63. For example, see Note, *Constitutional Law -- First Amendment -- Fourth Circuit Rules That a Teacher's Selection of School Curriculum Is Not Protected Speech -- Boring v. Buncombe County Board of Education*, 112 Harv. L. Rev. 982,987 (1999), "Given the profound impact of these questions on the future of American democracy, the Supreme Court should clarify the muddied jurisprudence and render explicit the underlying values that have led courts prior to *Boring* to grant limited deference to teachers' curricular speech."

BEST COPY AVAILABLE

EXAMINING THE PRESENT AND THE FUTURE OF LEGAL PROTECTIONS FOR CONTROVERSIAL TEACHING IN PUBLIC SCHOOLS

Kevin Welner[1]
University of Colorado
School of Education

This paper offers a succinct discussion of material presented at length in:
Kevin G. Welner, *Locking up the marketplace of ideas and locking out school reform: Court's imprudent treatment of controversial teaching in America's public schools*, 50 UCLA L. REV. 4 (forthcoming in April, 2003).

Because Professor Ronald Hyman is presenting a closely related paper, entitled, "Protected Classroom Speech of Public School Teachers: *Pickering* and Its Progeny," I will structure my ELA presentation to build on Ronald's work. I will also structure my presentation to build on the conference theme, "Balancing rights: Education law in a brave new world," which focuses on the tension between certain societal demands and basic rights of students, teachers, and others at school sites. My presentation will examine a messy web of such demands and rights, all arising out of the issue of controversial pedagogy.

Teachers hear some of these demands from federal and state officials (increasingly in the form of specified curricular standards) and some from more local sources, such as district and school rules and guidelines. Other demands come from parents and school site councils.

Yet these demands are not always consistent. Teachers are generally expected to stay within narrow boundaries drawn by centralized authorities, but they are also expected to engage students in critical thought using innovative teaching. Moreover, demands vary from state to state, from district to district, and (increasingly, due to theme and choice schools) from school to school. Layered on top of this complexity is an arcane body of law, drawing on a mish-mash of public forum analysis (*Hazelwood*),[2] the concept of academic freedom,[3] the requirement of notice,[4] and the *Pickering/Connick* extra-classroom, public-employee-speech line of cases.[5] Several recent court decisions have applied such precedent to in-classroom speech cases in ways that essentially eliminate constitutional protections for teachers. This presentation presents, and argues for, an alternative legal framework.

---

[1] J.D., UCLA, 1988; Ph.D., UCLA, 1997. Assistant Professor, University of Colorado at Boulder, School of Education, and co-director of the School's *Education and the Public Interest Center* (EPIC). Dr. Welner's work on this paper was funded, in part, through the support of a post-doctoral fellowship granted by the Spencer Foundation and the National Academy of Education. However, the opinions and ideas expressed herein are solely the responsibility of the author.

[2] *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

[3] See W. Stuart Stuller, *High School Academic Freedom: The Evolution of a Fish Out of Water*, 77 NEB. L. REV. 301 (1998) (tracing the evolution of substantive and procedural academic freedom in secondary public schools). See also Sterzing v. Fort Bend Independent School Dist., 376 F.Supp. 657, 662 (S.D.Tex.), *vacated for reconsideration of relief granted*, 496 F.2d 92 (5th Cir. 1972); Albaum v. Carey, 283 F.Supp. 3, 11 (E.D.N.Y. 1968):

Curriculum, Public Interest, and the Missing First Amendment

In *Newton v. Slye*,[6] a teacher was prohibited from posting "banned books" pamphlets on a bulletin board outsider her classroom door. The court first noted that, pursuant to *Boring v. Buncombe County Board of Education*,[7] a teacher has no First Amendment rights to control the curriculum.[8] The court then reasoned that, if the pamphlets are not considered curriculum, *Pickering* controls and the public interest analysis is used: "First Amendment protection depends on whether the posting of the pamphlets was a matter of public concern or of

---

> The considerations which militate in favor of academic freedom – our historical commitment to free speech for all, the peculiar importance of academic inquiry to the progress of society, the need that both the teacher and student operate in an atmosphere of open inquiry, feeling always free to challenge and improve established ideas – are relevant to elementary and secondary schools as well as to institutions of higher learning.

Similarly, the court in *Malverne Sch. Dist. v. Sobol*, 181 A.D.2d 371, 586 N.Y.S.2d 673 (App. Div. 3d Dept. 1992) upheld the Commissioner of Education's prevention, on grounds of academic freedom, of the discipline of a teacher who had refused to comply with the school board's directive to rescind an assignment requiring students to write on the locally controversial firing of a television sports commentator. And in *Stachura v. Truszkowski*, 763 F.2d 211, 215 (6th Cir. 1985), the court held constitutionally protected, as an exercise of his academic freedom, a teacher's inclusion of sexual material in his life science class. But compare the court's opinion in *Miles v. Denver Public Schools*, 944 F.2d 773 (10th Cir. 1991), deciding that a secondary school teacher has no right to academic freedom.

[4] For a comprehensive exploration of this notice requirement, see William G. Buss, *Academic Freedom and Freedom of Speech: Communicating the Curriculum*, 2 J. GENDER RACE & JUST. 213, 264-273 (1999). Buss proposes four possible bases for this requirement: (a) implied contractual rights, (b) the creation of a designated public forum (c) procedural due process, (d) the vagueness doctrine, and (e) substantive due process. See, e.g., *Sterzing, supra*, 376 F.Supp. at 662; *Mailloux v. Kiley*, 323 F.Supp. 1387, 1392 (D.Mass), *aff'd per curiam*, 448 F.2d 1242 (1st Cir. 1971); *Parducci v. Rutland*, 316 F.Supp. 352, 355 (M.D.Ala. 1970).

[5] *Pickering v. Bd. of Educ.*, 461 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).

[6] 116 F. Supp. 2d 677 (W.D.Vir. 2000).

[7] 136 F.3d 364 (4th Cir. 1998).

[8] 116 F. Supp. 2d at 684.

curriculum."[9] But this statement implies that the choice between these two options will determine whether the teacher may, in fact, be protected by the First Amendment. Is this really the case?

Whether the pamphlets fall within the definition of "curriculum" depends on which definition is used.[10] Curriculum can be categorizing as either "intended," "hidden," "implemented," or "attained."[11] Courts are primarily interested in the intended and the implemented curricula – the lesson plans and what actually takes place in the classroom.[12] This narrow definition might not include a posting outside the classroom door. But recent court decisions have also taken a fairly expansive view of curriculum, presumptively including such activities as newspapers[13] and plays.[14]

Thus, given the broad definitions used by courts and many curriculum specialists, the pamphlets most likely should be considered to be curriculum. But this determination makes little difference. Using the *Newton* rubric, a determination that the pamphlets are curricular means that *Hazelwood*, and not *Pickering*, provides the applicable law. Assuming, however, that *Pickering* had been applied (that is, if the pamphlets were not considered curricular), the court would then consider the *Pickering* dichotomy between private speech and speech that presents matters of public concern. Moreover, in the context of the classroom, the *Newton* court highlights a second, related, dichotomy between curriculum and private speech. Even were an instance of controversial teaching to somehow be characterized as outside the curriculum, then the chances are very high that it would fail the *Pickering* test, since it would likely also be outside the public interest. Any classroom speech becomes either unprotected curriculum (matters of public concern), or unprotected non-curriculum (private speech).

These false dichotomies squeeze out the First Amendment. Pursuant to *Hazelwood*, the First Amendment affords little oversight for curricular decisions. Pursuant to *Pickering*, the First Amendment affords little oversight for decisions to punish or squelch private speech. The dichotomies appear to leave no room for academic freedom arguments protecting instructional techniques or curriculum implementation that is too creative.

One obvious step along the path out of this trap would be to renounce use of the *Pickering* test for in-class teacher speech. Another step would be to recognize that *Hazelwood*'s discussion of curriculum is not directly transferable from students to teachers. Finally, as discussed in greater detail in the remainder of this article, courts should engage in a meaningful, case-by-case analysis of classrooms' potential status as designated public forums.

---

[9] 116 F. Supp. 2d at 685.

[10] For a discussion of the wide variety of definitions, see Philip W. Jackson, *Conceptions of the curriculum and curriculum specialists*, in PHILIP W. JACKSON (Ed.), HANDBOOK OF RESEARCH ON CURRICULUM 3-40 (1992).

[11] Jackson, *supra*, note 10.

[12] See, e.g., Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718 (8th Cir. 1998).

[13] *Hazelwood, supra*, note 2.

[14] *Boring, supra*, note 7.

The Impact of School Choice on Teacher Speech

This section considers one on-going educational reform that is presently having a major impact on American schooling and educational policy. The content, presuppositions and implications of this reform – school choice – highlight the need for courts to move toward a broader, more comprehensive analysis of teacher speech cases.[15] School choice is designed to distribute more power among teachers and parents.[16] The choice movement is intended to create laboratories of experimentation in school design and instruction by devolving power to parents and to those (including teachers) who take it upon themselves to design, create, and maintain choice schools.[17] Within choice governance systems, policy-making is decentralized and greater importance is placed on students' and parents' decisions about what sort of educational experiences are best for them. Teachers, too, select schools with philosophies consistent with their own. This is far from a one-size-fits-all model.

---

[15] For a related argument, also contextually grounded in the role and purpose of public education, see Gregory A. Clarick, *Note, Public School Teachers and the First Amendment: Protecting the Right to Teach*, 65 N.Y.U. L. REV. 693 (1990) (arguing that courts should allow teachers to retain broad first amendment protections in order to carry out their legitimate teaching duties).

[16] *See* William Foster, *Restructuring Schools, in* 4 ENCYCLOPEDIA OF EDUCATIONAL RESEARCH (6th ed.) 1108 (Marvin Alkin ed., 1992); JOHN E. CHUBB AND TERRY M. MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS (1990); KENNETH HOWE, UNDERSTANDING EQUAL EDUCATIONAL OPPORTUNITY (1997); Patricia Wohlstetter and Thomas Buffett, *Decentralizing Dollars Under School-Based Management: Have Policies Changed?* 6(1) EDUC. POLICY 35 (1992).

[17] See AMY STUART WELLS, TIME TO CHOOSE: AMERICA AT THE CROSSROADS OF SCHOOL CHOICE POLICY (1993); STEPHEN D. SUGARMAN AND FRANK R. KEMERER, SCHOOL CHOICE AND SOCIAL CONTROVERSY: POLITICS, POLICY, AND LAW (1999); FREDERICK M. HESS, REVOLUTION AT THE MARGINS: THE IMPACT OF COMPETITION ON URBAN SCHOOL SYSTEMS (2002). *See generally*, BRUCE FULLER AND RICHARD F. ELMORE WITH GARY ORFIELD (Editors) WHO CHOOSES? WHO LOSES? CULTURE, INSTITUTIONS, AND THE UNEQUAL EFFECTS OF SCHOOL CHOICE (1996); THOMAS L. GOOD AND JENNIFER S. BRADEN, THE GREAT SCHOOL DEBATE: CHOICE, VOUCHERS AND CHARTERS (2000). *But see* AMERICAN FEDERATION OF TEACHERS, DO CHARTER SCHOOLS MEASURE UP? THE CHARTER SCHOOL EXPERIMENT AFTER 10 YEARS, 68-69 (2002) (concluding that "unique approaches to curriculum, teaching and classroom-based instruction rarely occur in charter schools").

Charter school legislation, for instance, is specifically designed to promote local innovation by freeing charter schools from a variety of state legislation.[18] Magnet schools came into prominence as a desegregation tool, intended to lure white students to inner city schools with innovated programs.[19] Vouchers reforms are similarly grounded in the idea of parental choice among meaningful alternatives.[20] All these choice approaches eschew the premise that schools should attempt to replicate the norm. If they are not innovative, then there remains little or no policy rationale for their existence.

Accordingly, a charter school (or a magnet or voucher school) might theoretically be designed around a "marketplace of ideas" theme. Another such school might be designed around an "indoctrination" theme. A court faced with twin teacher speech cases arising out of two such dissimilar hypothetical schools should employ a legal rubric allowing consideration of the unique school goals and school designs. Consider three common whole-school reform models, all of which were recognized by the U.S. Congress through its Comprehensive School Reform Demonstration Program.[21] On the one hand, schools may adopt E.D. Hirsch's "Core Knowledge" curriculum[22] or

---

[18] *See generally*, BRUCE FULLER (Editor), INSIDE CHARTER SCHOOLS: THE PARADOX OF RADICAL DECENTRALIZATION (2000); Amy Stuart Wells, Alejandra Lopez, Janelle Scott, & Jennifer Holme, *Charter Schools as Postmodern Paradox: Rethinking Social Stratification in an Age of Deregulated School Choice*. HARV. ED. REV. 69(2), 172 (1999).

[19] See CLAIRE SMREKAR AND ELLEN B. GOLDRING, SCHOOL CHOICE IN URBAN AMERICA: MAGNET SCHOOLS AND THE PURSUIT OF EQUITY. (1999); Kimberly C. West, *A desegregation tool that backfired: Magnet schools and classroom segregation*. 103 YALE L.J. 2567 (1994).

[20] See CHUBB & MOE, supra, note 16; JOHN F. WITTE, THE MARKET APPROACH TO EDUCATION (1999); GILL, B., TIMPANE, M., ROSS, K., & BREWER, D., RHETORIC VERSUS REALITY: WHAT WE KNOW AND WHAT WE NEED TO KNOW ABOUT VOUCHERS AND CHARTER SCHOOLS (2001).

[21] The Comprehensive School Reform Demonstration program (P.L. 105-78), begun in 1998, was designed to increase the quality, and accelerate the pace, of school-wide reforms in high-poverty and low- achieving schools, especially schools receiving Title I funds. The legislation promotes the adoption of comprehensive school reforms that are based on reliable research and effective practices, and that include an emphasis on basic academics and parental involvement. The 17 programs referenced in the legislation are not exclusive; the list was intended only to provide guidance of the sort of program what would be approved for funding.

[22] See E. D. HIRSCH, JR., (editor), WHAT YOUR 6TH GRADER NEEDS TO KNOW: FUNDAMENTALS OF A GOOD SIXTH-GRADE EDUCATION (1993); E. D. HIRSCH, JR., THE SCHOOLS WE NEED AND WHY WE DON'T HAVE THEM (1996); M. MARSHALL, CORE KNOWLEDGE SEQUENCE CREDITED IN TEST SCORE BOOSTS. (1996); SAM STRINGFIELD,

Robert Slavin's "Success for All" program,[23] both of which are rather highly structured. Teachers at such schools would likely be considered to have notice that certain lessons are acceptable and certain lessons are not. Other schools, however, may decide to participate in Ted Sizer's Coalition of Essential Schools, which seeks to develop students' critical thinking skills and asks teachers to play the role of coach and professional rather than merely delivering predetermined curriculum.[24]

A More Comprehensive Analytical Framework

The Supreme Court has not yet applied public forum analysis to a teacher classroom speech case. A strong possibility exists, however, that the Court would do so if presented with the appropriate case. If so, the narrow focus of such an analysis would exclude or obscure the academic freedom and marketplace of ideas concerns that the Court recognized in earlier cases.[25] Given the weaknesses inherent in this approach, some commentators have renounced the use of public forum analysis, particularly in curricular speech cases.[26] But the discussion presented below argues instead that it can and should be applied in a manner that would present finders of fact with a contextualized understanding of any given classroom. In fact, I contend that school reforms such as school choice have the potential to compel the Court to focus on such context.

As generally articulated, a designated, limited public forum is created on government property when the government so intends.[27] But classrooms are governed by a variety of edicts issued in a variety of ways by people and bodies at a variety of governmental levels. School boards, for example, have the authority to micro-manage classroom curriculum and instruction, but they normally delegate that authority to the school site.[28] This raises

---

Amanda Datnow, & Nunnery, J., First-year evaluation of the implementation of the Core Knowledge sequence: Qualitative report. (1997).

[23] See Robert E., Slavin, Madden, N.A., Dolan, L.J., & Wasik, B.A., Every child, every school: Success for All (1996).

[24] See Theodore R. Sizer, Horace's School: Redesigning the American High School (1991).

[25] See *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 512 (1969).

[26] See, e.g., Helene Bryks, Comment, *A Lesson in School Censorship*: Hazelwood v. Kuhlmeier, 55 Brook. L. Rev. 291, 304-09 (1989) (arguing that public forum analysis should not be applied to curricular speech).

[27] *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46(1983).

[28] "School boards ... normally delegate the authority to decide matters of policy implementation to professionally trained personnel. Thus, in practice, school boards give varying degrees of discretion to principals, teachers, and librarians through explicit or implicit delegations of authority." Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. Ill. L. Rev. 15, 89.

issues of fairness in instances where those school boards attempt to punish teacher speech. As Professor Ingber notes, school authorities, "[h]aving developed, whether or not intentionally, a decentralized decision-making structure, ... should be judicially bound to abide by it."[29]

From a perspective that accounts for such delegations and other contextual differences between schools, the key to a public forum analysis of teacher classroom speech will be the court's findings concerning the intent of diffuse governmental authorities to open the classroom to expressive activity.[30] In *Miles v. Denver Public Schools*, for instance, the court looked at school-level intent: "There is no evidence that school authorities intended to open Miles' government class for public discourse."[31] But such intent will not always be the same. If the government (e.g., the state, the school district, the founders of a choice school, the principal, or the site-based council formed as part of a decentralization reform) had been found to have structured Miles' classroom for the teaching of critical thinking, then diverse ideas and opinions would have likely been welcomed, and the classroom would arguably have become a designated, limited public forum.

Governmental intent can also be viewed in terms of adequate notice. The organizational and political context surrounding a teacher may indeed be large and unwieldy, but it can nonetheless result in clear notice. The teacher in *Conward v. Cambridge School Commission*, for instance, should have known that a general state statute prohibiting "conduct unbecoming a teacher" encompassed his decision to give a female student an "Application for a Piece of Ass."[32] No contrary rules were set forth at other organizational layers. And the teacher in *Kirkland v. Northside Independent School District* had clear notice of the district's officially adopted reading list.[33] But these are questions of fact. If a principal tells teachers that they are free to adopt a particular book even though it is not on the official list, then a court may find that the teacher did not have adequate notice that use of a given book not on the list would result in sanctions.

---

[29] Ingber, *Pall of Orthodoxy*, *supra* note 28, at 90. *See also* Cary v. Board of Education, 598 F.2d 535, 543 (10th Cir. 1979); Sterzing, 376 F.Supp. at 662.

[30] A determination of whether the state has created a designated public forum begins with an examination of governmental intent through an evaluation of past and present policy and practice. The next step is an analysis whether past use of the forum "has been limited by well-defined standards tied to the nature and function of the forum." Gregoire v. Centennial Sch. Dist., 907 F.2d 1366, 1371 (3rd Cir. 1990). Finally, the court may investigate the "permission procedure" and permission history related to speech in the forum. *Id.*; *see also* Duran v. Nitsche, 780 F.Supp. 1048, 1053 (E.D. Penn. 1991).

[31] 944 F.2d at 776.

[32] 171 F.3d 12, 23 (1st Cir. 1999).

[33] 890 F.2d 794 (5th Cir. 1989).

Alternatively, consider what happens to adequate notice if the principal tells the teacher, "Here's the district's official reading list, but pursuant to our restructuring reforms, I want you to exercise your professional discretion in deciding whether to use books not on that list." Put in terms of public forum analysis, has this principal acted as a governmental policy-maker and created a designated, limited public forum? As William Buss has pointed out, this is an odd sort of forum given that the teacher is the only one given the associated speech rights.[34] Accordingly, a notice analysis may be more apt. In contrast, public forum analysis seems fairly appropriate in a scenario whereby school authorities pursue an 'open classroom' approach throughout the school, clearly inviting a marketplace of ideas.[35] A teacher should prevail in such cases if either (a) she was acting properly within the scope of a limited public forum, or (b) she was given inadequate notice that her action would be improper. In the former circumstance, the teacher should have free speech protection; in the latter, the teacher's due process rights should provide protection.

Public school teachers unquestionably serve as vehicles for curricular delivery, but they are also people with First Amendment protections.[36] Moreover, teachers' implementation of curricula can be viewed as existing along a continuum. At one end is the *fidelity approach*, whereby teachers implement the curriculum document exactly as created. At the other end is the *mutually adaptive (or evolutionary) approach*, whereby teachers apply their professional best judgment, adapting the curriculum into meaningful practice within their particular classroom context. In fact, many curriculum documents are written for the latter group of teachers, hoping for flexibility.[37] Most teachers do much more than simply read a script. These teachers, while technically instructional tools, are not automatons. Each will necessarily deliver curriculum that is at least slightly different than that of his or her colleagues down the hall. Such differences are seen by most educational scholars as highly desirable.[38]

Consequently, each case must be judged on its own merits. While recent, more restrictive decisions recognize the expanded authority of school boards and other policy-makers to prescribe curriculum in an exacting and controlling way, this deference should be balanced against legal and policy concerns about notice, academic freedom, and the pedagogical value of free speech. These recent cases have gone too far when they allow arbitrary,

---

34 Buss, supra note 4, at 253.

35 See HERBERT KOHL, THE OPEN CLASSROOM: A PRACTICAL GUIDE TO A NEW WAY OF TEACHING (1969); CHARLES SILBERMAN, CRISIS IN THE CLASSROOM (1970); ROLAND S. BARTH, OPEN EDUCATION AND THE AMERICAN SCHOOL (1972); Lydia A. H. Smith, *"Open Education" Revisited: Promise and Problems in American Educational Reform (1967-1976)*, 99(2) TEACHERS COLLEGE RECORD, 371 (Winter, 1997).

36 See, e.g., *Stachura, supra*, 763 F.2d at 215.

37 Jean A. King, *Curriculum implementation*, in MARVIN ALKIN (Ed.), 1 ENCYCLOPEDIA OF EDUCATIONAL RESEARCH (6th Ed.) (1992), 267-273.

38 Of course, teacher discretion becomes undesirable when it is used to subvert the intent of curriculum designers or of the teachers' bosses.

ex post facto punishment of teachers' curricular decisions that had never been proscribed with adequate notice. And, perhaps more importantly, courts should not forbid school authorities from adopting policies that do just the opposite -- that free up teachers to use the classroom as a place for modeling democracy and for developing critical thinking skills. If policy-makers affirmatively create this sort of designated public forum, then courts should recognize and respect those decisions. As a policy matter and as a First Amendment matter, courts should protect the right of teachers to speak freely within the bounds set by those teachers' superiors.

This analysis points to the need for a new constitutional framework to be used by courts faced with teacher speech cases. This framework must allow courts to view classrooms as they truly are – to understand the daily struggles of teachers as they try to create a stimulating and meaningful educational experience for their students. Pursuant to the weight of educational scholarship and generally accepted national goals, today's classrooms and today's teachers should be provided with the freedom and the incentives to instill morals and interpersonal skills and to teach critical and so-called "higher order" thinking skills.[39] Further, American students should be equipped to participate fully as insightful members of a democracy.[40] The constitutional framework that courts now apply most often to these cases gives short shrift to these concerns. Instead, these courts limit themselves to a relatively meaningless analysis based on one or more of three superficial considerations: (1) the courts should not interfere with democratic decisions made by locally elected school boards; (2) teacher speech is protected only if it addresses a matter of public concern; and (3) teacher classroom speech is part of the curriculum, is therefore given little if any protection, and is subject to district regulation. The first consideration simply begs the question; we do not live in an unrestricted democracy. The judicial review process is intended precisely to prevent a tyranny of the majority. The key question presented to the courts is whether the teacher's rights have been violated. If they have, then the court is obliged to interfere with the school board's decision.

The second consideration, which is generally used alternatively with the third, is a spurious application of a rule set forth by the Court for analysis of speech taking place outside the classroom. It is difficult, if not impossible, to characterize curricular speech as inside or outside the scope of "public concern."

The third consideration is also in need of alteration. Circular reasoning, concluding without analysis that teacher speech is relatively unprotected, arises out of the presently preferred rubric – public forum analysis – but both the selection and the operation of this rubric are uncertain. The resulting court decisions have often been *ad hoc* and arbitrary.

If courts are to use public forum analysis, then the scope of that analysis should be made more comprehensive. In considering whether the classroom is a designated, limited public forum, the courts should weigh the role of the classroom and the role of teachers in today's society *and* in the teacher's particular school.[41] American policy makers have stressed the importance of teacher professionalism, of teaching higher-order thinking skills, of preparing students to be insightful participants in American democracy, of developing interpersonal skills, and of and instilling morals. Some schools pursue these goals very diligently. Yet these schools' teachers are unlikely to fulfill such demands if making the effort would subject them to discipline. Courts that broaden the scope of their public forum analysis to include consideration of these policy goals, when appropriate, are much more apt to conclude that the relevant set of policy makers have, indeed, intended to create a limited public forum.

---

[39] See Karen Ngeow and Yoon-San Kong, *Learning To Learn: Preparing Teachers and Students for Problem-Based Learning*. ERIC Digest, ED457524. October, 2001.

[40] See R. Freeman Butts, *National Standards and Civic Education in the United States*. INTERNATIONAL JOURNAL OF SOCIAL EDUCATION, Vol. 7 (Winter 1993), pp. 86-94.

This sharpened public forum approach focuses on the educational context. Notice, delegation, and limited public forums each offer potentially useful perspectives. But each must also be applied in such a way as to recognize the reality of difference at the school site level. Some schools are specifically designed to place teachers in a ministerial role, while others will only be successful if teachers exercise their own discretion. It is therefore at the site level that courts will often find the most compelling evidence of governmental expectations and notice.

Consider the example of a Missouri teacher who was fired for refusing to instruct her high school students to refrain from using "indecent" language in their writing assignments.[42] She had made a conscious pedagogical decision to resist correcting such language because she felt that her inner-city students were easily discouraged. If she substantially criticized their initial efforts at writing, she reasoned, she would get no further efforts. The National Council of Teachers of English came to her defense, pointing out that the teaching methods she used were of the type that they most highly recommend to encourage student writing.

The Eighth Circuit ignored these concerns, applying instead the *Hazelwood* "legitimate pedagogical concern" standard and doing so in a rather superficial way.[43] This court did, however, have a variety of other available options. It could have decided not to apply public forum analysis and relied instead on one of the earlier lines of cases. For example, it may have cited *Kingsville Independent School District v. Cooper*[44] for the proposition that teachers should be given wider discretion in the area of methodology than in the area of curriculum content.

Alternatively, applying the constitutional framework proposed herein, the court would consider the role of the classroom and the teacher in today's society and in the particular school in question. It would weigh the conflicting directives or types of notice that policy makers have given teachers – taking into account national and state policies as well as local policy. It would take testimony concerning any professionalization policies.

---

[41] See generally Lee Gordon, *Note, Achieving a Student-Teacher Dialectic in Public Secondary Schools: State Legislatures Must Promote Value-Positive Education*, 36 N.Y.L. SCH. L. REV. 397, 407-08 (1991) ("The public forum analysis bases the government's regulation of the speech in question on the nature of the forum in which the speech takes place").

[42] Lacks v. Ferguson Reorganized Sch. Dist., 147 F.3d 718 (8th Cir. 1998).

[43] 147 F.3d at 724.

[44] 611 F.2d 1109 (5th Cir. 1980).

Assuming that the school had formed a site-based council, the court would consider policies originating therefrom. If the school had a special focus, as do most choice schools, then this focus would be considered. Then, based on a comprehensive understanding of these factors, the court would determine the marching orders given to this teacher. Was this teacher given notice that the teaching approach was forbidden? If no, then her due process rights should have prevented her termination. Alternatively, did policy makers intend to give the teacher the protections found in a designated, limited public forum. If so, then the court must determine whether the teacher acted properly within the scope of that forum.

Consider also the teacher in *Boring v. Buncumbe County Board of Education.*[45] While the school probably did not create a limited public forum, the teacher was just as probably given inadequate notice that the play was forbidden. Her complaint alleged that she notified her principal "as she did every year" of the name of the play she had chosen, and the principal "did not comment or react."[46] Pursuant to this proposed framework, the court would examine policies emanating from the principal's office. After considering the entire scope of school policy-making, the court could have reasonably decided that the policy-makers with responsibility for Ms. Boring's classroom did not intend to create of a limited public forum. But the court should not have neglected the importance of notice.[47] This proposed standard acknowledges America's decentralized system of education – rejecting the one-size-fits-all mentality predetermining all classrooms to be nonpublic forums. Of necessity, it leaves in place the judicial task of subjectively weighing criteria, but only after first requiring that the court consider the most relevant considerations.

---

[45] 136 F.3d 364 (4th Cir. 1998).

[46] *Id.*, at 375.

[47] "Plaintiff's contention that she was not given notice as to what was being proscribed is, of course, without merit, the plaintiff having no First Amendment right to participate in the makeup of the curriculum" (136 F.3d at 371 n.2). Because the job action in this case was only a transfer to another school, the teacher's property rights were not impaired to the extent as a teacher who is terminated. But the *Boring* court never expressly considered such matters.

School Board Training Academy:

A project for the 21st Century and beyond

Funded by the Louisiana Board of Regents
Distance Education Initiative Program

Presented at 48th Annual Education Law Association

National Conference—New Orleans, Louisiana

November 14-16, 2003

By

***Nathan M. Roberts, J. D., Ph.D.**
Assistant Professor
University of Louisiana at Lafayette
Educational Foundations & Leadership
P.O. Box 43091
Lafayette, LA 70504-3091
Office (337) 482-5264
E-mail nmr0713@louisiana.edu

School Board Training Academy

A Project for the 21st Century and beyond

School board member training in the areas of school law, governance and current research and policy is essential for board members to fulfill their roles as educational leaders. School board member training looms even more important with the enactment of Louisiana Revised Statute 17:53 that mandates training for school board members in three important areas; (1) education law, (2) school board powers, duties and responsibilities, and (3) educational trends, research and policy. Louisiana Revised Statute 17:53 states:

"A. Each member of a city and parish school board shall receive a minimum of six hours of training and instruction in the school laws of this state, in the laws governing the powers, duties, and responsibilities of city and parish school boards, and in educational trends, research, and policy. Such instruction may be received from an institution of higher education in this state, from instruction sponsored by the state Department of Education, or by an in-service training program conducted by a city or parish school board central office or the Louisiana School Boards Association.

B. The higher education institution, the state Department of Education, a city or parish school board central office, or the Louisiana School Boards Association, as the case may be, shall issue a certificate of completion to each city or parish school board member who completes the instruction as required by this Section and a copy of such certificate shall be entered into the minutes of the city or parish school board on which such member serves. The superintendent of the school system on which the member serves shall be responsible for verifying that the instruction meets the requirements of this Section. Upon completion of such instruction, it shall not be necessary for a member of a city or parish school board to receive additional instruction as required by this Section upon being reelected to the board."

The implications for school board members cannot be minimized. Training and instruction in the areas of education law, governance and trends in research and policy are required and the failure to obtain training could result in a charge of malfeasance in office.

Louisiana is not alone in its endeavor to prepare school board members for the crucial task of leading school districts. Other states have enacted similar laws including Texas (19 Texas Administrative Code 61.1) and Georgia (Georgia Code 20-2-230). The Georgia legislation provides that before or within one year after assuming office, each school board member shall receive 12 hours of training in the educational program objectives of Georgia and instruction in school finance; school law; responsiveness to the community; the ethics, duties and responsibilities of local governing board members. Georgia also requires school board members to participate in at least one day of training annually to ensure effective management and operation of local units of administration.

Louisiana Revised Statute 17:53 adopted in 1998 provides for several ways school board members can obtain training, including from an institution of higher education. In the fall of 2001, the University of Louisiana at Lafayette wanted to assist school board members by establishing a school board training academy to provide the training required by the legislature. A grant proposal was submitted to the Louisiana

Board of Regents through its Distance Education Initiative Program to plan the school board training academy. The proposal called for a training program to be offered to school board members as a video conference available at multiple higher education sites. This arrangement was designed to encourage school board members to come on to the campus of their regional higher education institution to foster collaborative interaction between K-12 systems and higher education institutions. The program is designed to address the duties and responsibilities of school board members, review the state accountability standards including an understanding of how recent state accountability policies impact local school and school district accountability improvement initiatives, and offer an update on relevant education cases and legislation. The outside consultants who reviewed the proposal concurred that a school board training academy, presented as a video conference to multiple sites throughout the state, would provide an excellent opportunity for higher education to enhance its role in supporting K-12 education in Louisiana. A planning team composed of representatives from higher education, the Louisiana School Board Association, school board members and school district administrators met to ensure the training academy addressed the basic tenants of education law, school board powers, duties and responsibilities as well as the current trends in education research and policy. In addition to providing the training by compressed video, the academy will create a web presence at http://www.coe.louisiana.edu/trainingacademy tied to either the University of Louisiana at Lafayette College of Education or the Louisiana School Board Association web-site to place background information and relevant new material for school board members.

The concept for a school board training academy, that would provide high quality training at a low cost presented as a video conference throughout the state, was presented to the Board of Directors of the Louisiana School Board Association at their February, 2001 meeting. After reviewing the proposal and discussing the need for school board member training, the Board of Directors voted to endorse the training academy as a positive step forward for the benefit of both students and school districts. The date for the training session is Wednesday, January 8, 2003, after the fall 2002 school board elections, although the training is not limited to newly elected board members. The exact locations and time will be determined at a later date and additional information concerning the training including a list of presenters and topics will be forwarded to all superintendents in the state and will be posted on the training academy's web-site. At the conclusion of the training, participants will be requested to complete on-line questionnaires available at the training academy web-site. The responses will be analyzed by the planning team and future training programs will be based in part on the results. Additional efforts to disseminate the results of the training will include the compilation of a list of frequently asked questions (FAQs) and their answers that will be made available on the training academy web-site.

Conclusion

School board member training is more important today than ever. The Louisiana legislature along with several other state legislatures have recognized the need to prepare school board members for the difficult task of leading school districts into the 21st century and through the era of accountability. The School Board Training Academy, supported by the Board of Regents Distance Education Initiative Program, is an excellent opportunity for higher education to link with K-12 education to assist school board members with high quality, low cost training to comply with the directives of the state legislature and to help serve the students of Louisiana.

Questions or requests for additional information regarding the School Board Training Academy, should be directed to Nathan Roberts, Assistant Professor at the University of Louisiana at Lafayette at (337) 482-5264 or E-mail at nmr0713@louisiana.edu.

* Nathan Roberts is the former General Counsel to the Lafayette Parish School Board and is now an assistant professor in the Educational Foundations & Leadership Department in the College of Education at the University of Louisiana at Lafayette and the Director of the School Board Training Academy.

Religion and Education in Louisiana

David L. Stader, Assistant Professor
Southeastern Louisiana University

Tony Armenta, Associate Professor
Southeastern Louisiana University

Flo Hill, Assistant Professor
Southeastern Louisiana University

I. Historical Perspective

Church-state issues in education have a long history in our country. While the U.S. Supreme Court has made several landmark decisions with regard to the separation of church and state in schools, strong conservative influences in Southern states, including Louisiana, have resulted in state statutes and individual school district policies and practices that continue to "push the envelope" with regard to matters of church and state.

The debate, as it so often does, centers on the delicate balance between the Establishment Clause and the Free Exercise Clause of the First Amendment. Organizations like the American Civil Liberties Union and Americans United for the Separation of Church and State routinely cite the Establishment Clause as they attempt to erect a solid wall of separation between church and state. Conservative groups like the American Center for Law and Justice focus more on the Free Exercise Clause, arguing that it is unconstitutional not to allow freedom of religious expression in the public square, including in schools.

The U.S. Supreme Court, in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), used a three-part test to determine if a government action is constitutional. In order to pass constitutional muster, the statute or policy must, 1) have a secular purpose, 2) neither advance nor inhibit religion, and 3) not cause excessive entanglement between government and religion. Many lower courts today still use the *Lemon Test* to help determine constitutionality, although the current U.S. Supreme Court, particularly the more conservative members, favors a *Coercion Test* as used in *Lee v. Weisman*, 505 U.S. 577 (1992), or the *Endorsement Test* as applied in *Lynch v. Donnelly*, 465 U.S. 668 (1984). The first prong of the *Lemon Test* is one that has been looked at critically in the Louisiana cases that will be discussed later. Courts like the U.S. Court of Appeals for the Fifth Circuit have paid a great deal of attention to the intent of legislation or policies and, more often than not, have found the legislators', school board's, or school administrator's intent to have a purpose that is more sectarian than secular. The legislature and school boards have not been subtle, as evidenced by comments in public meetings, in expressing their desires to get religion back into the schools. Unfortunately for them, these public utterances, often part of an official meeting record, is evidence of their intent being sectarian rather than secular.

One of the U.S. Circuit Courts of Appeals that has been very active in matters of church and state is the previously mentioned Fifth Circuit. The Fifth Circuit Court of Appeals, based in New Orleans, is the appellate court for federal cases originating in Louisiana, Texas, and Mississippi. These states, particularly Louisiana and Texas, have repeatedly been involved in litigation challenging their statutes, or calling into question policies and practices by school districts in their states.

The landmark Supreme Court decision *Edwards v. Aguillard*, 482 U.S. 578 (1987), originated in Louisiana and dealt with a state statute requiring a balanced treatment between the teaching of evolution and "creation science." Since that momentous decision, school districts in Louisiana, as well as other Southern states, continue to seek ways around it, as will be discussed in detail in the next section. A more recent decision involving prayer at football games dealt with a case that originated in Texas. Another Louisiana case from the Fifth Circuit, *Freiler v. Tangipahoa Parish Board of Education*, 185 F.3d 337 (5th Cir. 1999), a case involving a disclaimer to be read before teaching about evolution, came within one vote of being granted certiorari by the U.S. Supreme Court. A U.S. Supreme Court decision involving state allocation of educational materials and equipment to private schools, *Mitchell v. Helms*, 530 U.S. 793 (2000), also had its origins in Louisiana.

A recent change in a Louisiana statute regarding prayer in schools, which did not have one "no" vote in the Legislature, was struck down by the Fifth Circuit Court of Appeals in *Doe v. School Board of Ouachita Parish*, 274 F.3d. 289 (5th Cir. 2001). And, more recently, a federal district court ruled in *Jabr v. Rapides Parish School Board*, 171 F.Supp. 2d 653 (2001), that school administrators, or any other agent of the school, may not hand out Bibles to students.

Yet another recent case in Louisiana centered on Governor Mike Foster's abstinence-only sex education program. The ACLU of Louisiana filed suit and argued that the program funneled money to groups that advanced religion and presented abstinence from a religious perspective (*ACLU of Louisiana v. Foster*, Civ. 02-1440, E.D. La., 2002. Available at 2002 U.S. Dist. LEXIS 13778). In a case that doesn't deal with education, the Fifth Circuit recently overturned a federal district court's decision that Louisiana's anti-abortion "Choose Life" license plate program was unconstitutional. It remains to be seen if this case is appealed to the U.S. Supreme Court.

While this might seem to be a small number of cases, schools and districts in Louisiana continue practices that would probably be ruled unconstitutional if someone with standing were to challenge the policies and practices. Despite the Supreme Court's ruling in a case that originated in Texas, *Santa Fe Independent School District v. Doe*, 120 S.Ct. 2266 (2000), prayer before athletic events is a common, and expected, part of community culture, and the more rural the community, the more a part of the culture it seems to be.

While there has always been an element of society that wanted to "get God back into schools," recent events in the United States have brought the issue to the forefront. One event was the shooting at Columbine High School in Littleton, Colorado. Another was the terrorist attack on September 11, 2001. The terrorist attack, in particular, spurred a new patriotic fervor, as well as stimulating a push by conservatives to return to prayer in schools. Several school districts, including Tangipahoa Parish School District in Louisiana, approved a policy to display "In God We Trust" posters in its schools. The district made the point that this was simply our nation's official motto, and not an attempt to incorporate religion into schools. Many other schools throughout the United States have reacted similarly. The Tangipahoa Parish School Board, according to the September 2, 2002 *Hammond*

Daily Star, also announced that to commemorate September 11, the board would start its first September, 2002, meeting with a ceremony in which students from area schools would lead a prayer. The practice of opening public meetings, including school board meetings, is commonplace in Louisiana and other Southern states.

Parents are vocal in their efforts to make sure traditions, many of them religious in nature, continue, and administrators, sometimes reluctantly and sometimes not, often acquiesce to community pressure. The last part of the presentation will be made by a former Louisiana school principal who will address the uncomfortable position administrators find themselves in when walking the fine line between what they know is law and community demands that, if not followed, could result in losing one's job or possible reassignment.

II. Case Law

The case summaries that follow, while not all-inclusive, are illustrative of the litigation involving the state of Louisiana, or school districts within the state, involving religion and education. Each case involved the courts attempting to determine "intent" of the particular statute, policy or practice. The final case, *Santa Fe Independent School District v. Doe*, while not a Louisiana case, still has implications for the state since it was heard by the Fifth U.S. Circuit Court of Appeals, and since the issue involved (prayer at athletic events) is one with which all Louisiana public school administrators must deal.

EDWARDS v. AGUILLARD
482 U.S. 578 (1987)

FACTS:

Louisiana's legislature passed the "Balanced Treatment for Creation-Science and Evolution-Science in Public School Instruction Act." The Act called for equal time instruction in creation science when evolution theory was taught. Neither topic was required to be taught at all, but if either was taught, the other also had to be taught. Further, the statute specified the development of curriculum guides and supplied research services for creation science only. A group of parents, teachers, and religious leaders challenged the constitutionality of the Act in federal court. School authorities charged with implementing the Act defended it on the ground that its stated purpose was to protect a legitimate secular interest: academic freedom. The federal district court ruled the Act unconstitutional and state education officials appealed to the Fifth Circuit Court of Appeals. The appeals court affirmed, ruling the statute did not protect academic freedom and attempted to discredit evolutionary theory by substituting religious instruction in the form of creationism. The case was appealed to the U.S. Supreme Court.

HOLDING:

The U.S. Supreme Court (7-2) affirmed the rulings of the two lower courts.

RATIONALE:

Justice Brennan argued that the Act failed all three prongs of the *Lemon Test*. First, it was not enacted to further a clear secular purpose. Second, the primary effect of the law was to advance the viewpoint that a "supernatural being created humankind," a dogma central to the beliefs of certain religions. Third, the law significantly entangled the interests of church and state by seeking "the symbolic and financial support of government to achieve a religious purpose."

Making an analogy to *Wallace v. Jaffree*, 472 U.S. 38 (1985), the Court did not regard the Act as furthering its stated purpose, even if "academic freedom" were read broadly to mean teaching all of the relevant evidence, because the Act did not grant additional teacher flexibility and because its provisions evidenced a discriminatory preference for the teaching of creation science and against the teaching of evolution.

The Court also relied on legislative history, particularly statements made by the Act's sponsor, during pre-enactment hearings.

FREILER v. TANGIPAHOA PARISH BD. OF EDUCATION
185 F. 3d 337 (5th Cir. 1999)
Cert. Denied

FACTS:

The Tangipahoa Parish School Board (TPSB) in Louisiana passed a resolution that required teachers to read a disclaimer immediately before the teaching of evolution. In part, the disclaimer read: *It is hereby recognized by the Tangipahoa Board of Education that the lesson to be presented, regarding the origin of life and matter, is known as the Scientific Theory of Evolution and should be presented to inform students of the scientific concept and not intended to influence or dissuade the Biblical version of Creation or any other concept. It is further recognized by the Board of Education that it is the basic right and privilege of each student to form his/her own opinion and maintain beliefs taught by parents on this very important matter of the origin of life and matter. Students are urged to exercise critical thinking and gather all information possible and closely examine each alternative toward forming an opinion.* The ACLU, on behalf of Herb Freiler and two unnamed plaintiffs, parents of children in the Tangipahoa Parish Public Schools, filed a suit in U.S. District Court for the Eastern District of Louisiana. The plaintiffs claimed that the disclaimer was for purely religious purposes which violated the separation of church and state. The district court ruled that the disclaimer constituted an establishment of religion in violation of the First Amendment. The School Board appealed to the Fifth Circuit Court of Appeals.

HOLDING:

The Fifth Circuit Court of Appeals affirmed the district court's ruling.

RATIONALE:

The district court decided that the disclaimer was devoid of secular purpose and did not pass the first prong of the three-part Lemon Test. The court discounted the school board's stated secular purpose of promoting critical thinking and information gathering by students on the subject of the origin of life. The court noted that TPSB members did not mention this secular purpose during the debate for adoption of the disclaimer and that the TPSB already encouraged students to think critically about all issues. The court ruled that the disclaimer was for one purpose — to protect and maintain a particular religious viewpoint and to satisfy the religious concerns of the majority. This clearly violated the separation of church and state. The appellate court affirmed and added that the disclaimer also failed the second prong of the Lemon Test and the Endorsement Test. By the endorsement of one particular religious viewpoint over another, the disclaimer advanced a particular religion, a further indication that there was a violation of the First Amendment. The appellate court went on to call the school board's stated purpose for the disclaimer a "sham."

Note: Following this decision, the school board asked for a hearing en banc and was denied by a vote of 8-7. The school board then appealed to the U.S. Supreme Court which denied cert. by a vote of 6-3.

DOE v. SCHOOL BD. OF OUACHITA PARISH
274 F.3d 289 (5th Cir. 2001)

FACTS:

A 1976 state law in Louisiana allowed public school students and teachers to observe a "brief time in silent meditation" at the start of each school day. In 1992 the law was amended to allow for a "brief time in silent prayer or meditation." Another amendment, in 1999, deleted the word *silent* from in front of the word "prayer." The bill was signed into law by Governor Foster. The law then read, "Each parish and city school board in the state shall permit the proper school authorities of each school within in its jurisdiction to allow an opportunity, at the start of each school day, for those students and teachers desiring to do so to observe a brief time in prayer or meditation." One mother (identified only as Jane Doe) of a West Monroe High School student said her son and another boy were called "atheist" and "devil worshipper" after they refused to participate in the prayer. A group of students and parents filed suit claiming the statute was unconstitutional. The federal district court agreed with the plaintiffs and ruled the law unconstitutional. The state appealed.

HOLDING:

The U.S. Court of Appeals for the Fifth Circuit affirmed the lower court's ruling that the law was unconstitutional.

RATIONALE:

Fifth Circuit Senior Judge John Duhe, Jr., wrote that the amendment to the previous statute was to return verbal prayer to public schools and was therefore in violation of the Establishment Clause of the First Amendment. The law, as amended, did not pass the *Lemon Test* because it did not have a clear, secular purpose. The court also cited the fact that the legislator who sponsored the amendment was on record as saying the amendment was intended to allow verbal prayer back in schools. Duhe wrote that the Louisiana case was almost identical to *Wallace v. Jaffree*, 472 U.S. 38 (1985), in which the Supreme Court struck down a similar statute.

NOTE: Following this ruling, Louisiana's legislature passed legislation returning the statute to its original form prior to having the word *silent* removed. Therefore, current state law goes back to the wording of the 1992 amendment that allows for "a brief time in silent prayer or meditation."

JABR v. RAPIDES PARISH SCHOOL BOARD
171 F.Supp. 2d 653 (2001)

FACTS:

A Muslin family had two children enrolled in the Rapides Parish school system. One of their children, Hesen, was a fifth-grader at Pineville Elementary School. The parents of Hesen claimed that the school's principal called children, including Hesen, into his office as the Christmas holiday approached, wished the children a "Merry Christmas," and presented each child with a Bible. When Hesen declined the Bible, she was told to "just take it." The parents said that their daughter felt pressured to accept the Bible. Additionally, the Jabr family alleged that their daughter "suffered scorn and ridicule from other students" after she explained that her family doesn't believe in the Bible. The defendants argued that the girl was not forced to accept the Bible and could have chosen not to accept it. The family, claiming that the school district violated the Establishment Clause whether or not students had a choice to take the Bible, filed suit in federal district court seeking injunction of the practice of distributing Bibles to children in the Rapides Parish school system..

HOLDING:

The district court enjoined the district and its personnel from continuing the practice of Bible distribution and ruled the practice unconstitutional.

RATIONALE:

Judge F. A. Little, Jr. used the "Lemon Test," the "Coercion Test," and the "Endorsement Test," and ruled that the principal's actions violated all three tests. The judge ruled that the principal was clearly trying to promote Christianity. The judge also cited the third prong of the "Lemon Test" when writing that the principal's actions entangled government with religion.

With regard to the school district's argument that the practice was not "coercive," the judge disagreed, stating that it is not reasonable to expect a fifth-grader to decline the Bible or walk out of the principal's office and open herself to peer pressure and ridicule.

The school district had used a previous Fifth U.S. Court of Appeals decision, *Meltzer v. Board of Instruction of Orange County, Florida*, 577 F.2d 311 (1978), to argue that case law supported its position. In *Meltzer*, the court ruled that a district's policy for Bible distribution and other books, at a designated location within the school, was not unconstitutional. However, Judge Little, in this case, ruled that the circumstances were not similar to those in *Meltzer* and that the principal's actions far exceeded what was approved by the Fifth Circuit in the *Meltzer* case.

ACLU of LOUISIANA v. FOSTER

Civ. 02-1440, E.D. La. (2002)

(Available at 2002 U.S. Dist. LEXIS 13778)

FACTS:

The state of Louisiana established, in 1998, the "Governor's Program on Abstinence (GPA)" in an effort to distribute acquired federal funds to develop sex education programs that "have as their exclusive purpose, teaching the...gains to be realized by abstaining from sexual activity." The federal funds had become available as the result of a federal statute that appropriated monies for programs promoting sexual abstinence.

The GPA used its money in a variety of way, one of which was to grant public funds to organizations and individuals, such as non-profit organizations or "professional service contracts," to promote abstinence. Several of these community-based contracts were awarded to organizations that were religiously affiliated.

The ACLU claimed that some of the "contractors" used the contracts to further their religious message and was a violation of the Establishment Clause of the First Amendment. One group, the Rapides Station Community Ministries, stated in its monthly report, "We were able to focus on the virgin birth and make it apparent that God [desired] sexual purity as a way of life." The Ministries also noted that the GPA funding was used to host a back-to-school youth revival that "proclaimed God's Word with power as to why we should live pure and Holy." Another group performed skits for students in which a character named "the Bible Guy," challenged students about their beliefs and stated that, "As Christians, our bodies belong to the Lord, not to us."

The plaintiffs sought an injunction barring the distribution of government monies to organizations and individuals who used the contracts for sectarian purposes.

HOLDING:

The district court granted an injunction enjoining the state of Louisiana from distributing public monies to organizations or individuals that advanced religion through the Governor's Program on Abstinence.

RATIONALE:

The judge, G. Thomas Porteous, Jr., wrote that there was ample evidence that many of the groups participating in the GPA were "furthering religious objectives." The judge, in applying the "Lemon Test," ruled that the state passed the first prong because there was no evidence that the GPA was motivated by anything other than a secular purpose. However, when he applied the second prong of the test," he found that the monies were going to organizations that were "pervasively sectarian," resulting in the advancement of religion.

The judge ordered that the GPA office was to "cease and desist from disbursing GPA funds to organizations and individuals that convey religious messages or otherwise advance religion in any way in the course of an event supported in whole or in part by GPA funds, or in any document or other resource that is produced and/or distributed in whole or in part using GPA funds. He also ordered the state to install safeguards to ensure compliance with the order.

SANTA FE INDEPENDENT SCHOOL DISTRICT v. DOE
120 S.Ct. 2266 (2000)

FACTS:

Prior to 1995, a student elected as Santa Fe High School's (Galveston, Texas) student council chaplain delivered a prayer over the public address system before each home varsity football game. In April of 1995, two students, one Mormon and one Catholic, challenged this practice as being violative of the Establishment Clause of the First Amendment and moved for a temporary restraining order. The respondents alleged that the district had engaged in several proselytizing practices, such as promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises. They also alleged that the district allowed students to read Christian invocations and benedictions from the stage at graduation ceremonies. In May 1995, the District Court entered an interim order addressing a number of different issues, one of which was graduation prayer and football game prayers. The court ruled that at graduation a "non-denominational prayer" consisting of "an invocation and/or benediction" could be presented by a senior student or students selected by members of the graduating class, as long as the text of the prayer was determined by students without scrutiny or pre-approval by school officials. In response to that portion of the order, the school district adopted a series of policies over several months dealing with prayer at school functions. One policy, titled "Prayer at Football Games," authorized two student elections, the first to determine whether "invocations" should be delivered, and the second to select a spokesperson to deliver them. It contained two parts, an initial statement that omitted any requirement that the content of the invocation be "nonsectarian and non-proselytizing," and a fallback provision that automatically added that limitation if the preferred policy should be enjoined. The students chose to allow a student to say a prayer at football games. The District Court did enter an order precluding enforcement of the first, open-ended policy. Both parties appealed, the district contending that the enjoined portion of the policy was permissible and the Does contending that both alternatives violated the Establishment Clause. The Fifth Circuit Court of Appeals ruled that the district's policy was unconstitutional. In citing the *Jones v. Clear Creek* case, the Fifth Circuit reaffirmed that the *Clear Creek* ruling only permitted student-led prayer at graduation ceremonies as a way to solemnize this once-in-a-lifetime event. The appeals court stated that a football game is "hardly the type of annual event that can be appropriately solemnized with prayer." The school district appealed to the U.S. Supreme Court.

HOLDING:

The Supreme Court (6-3) affirmed the Fifth Circuit Court of Appeals' ruling.

RATIONALE:

The Court stated that "The Constitution demands that schools not force on students the difficult choice between whether to attend these games or to risk facing a personally offensive religious ritual." The Court felt that such a policy coerces student participation in religious events. Even though students were elected by other students to give the prayer, the Court stated that the school district allowed the students to vote on a religious matter. The student speech could not be considered "private speech," according to the Court. "The delivery of such a message over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer — is not properly characterized as "private speech." Only one student is permitted to give a content-limited message and this suggests that the policy is not free expression.

III. The Administrator's Dilemma

What does a practicing administrator do from day to day and year to year when the law clearly states that common practices at school assemblies and daily classroom routines advocating religion are unconstitutional, but the mores of the community are otherwise? In reality, it becomes a balancing act of walking a tightrope. One can veer to the left or right minutely and suffer the consequences. Whether one falls to the left or to the right, there appears a significant price to pay. Negative consequences occur regardless.

The practice of saying a prayer at school assemblies, athletic events and before meals is quite common and expected in many Louisiana schools, especially rural communities. Christmas and Easter programs are thought to be as much of the school curriculum as reading, writing, and arithmetic in the elementary grades. The distribution of Bibles by the Gideons is welcomed and looked upon with favor. These are but a few of the issues facing practicing administrators on a daily basis. The following dilemmas are representative of the many decisions one must make yearly, perhaps even daily.

Dilemma #1

The invocation and benediction are a piece of the cultural norms that exist for school assemblies. In a heavily populated rural school, it is the norm that each year at the school awards program, a minister from one of the community churches is invited to give the invocation and the benediction. Rotation of the invitation occurs yearly until all area churches in the community have been represented through this annual event. If the principal made the decision to cease invitations to assemblies for prayer, the citizenry of the community and church members would be outraged. They want their ministers involved in, and aware of, their children's accomplishments. The support of the church in advocating education is essential to parents; thus, they believe the support of the school in advocating church involvement is essential. The old educational cliché, "it takes a whole village to raise a child," is used against the school. The community has previously embraced this belief and now the school is asking that the church not openly participate in educational accomplishments. Are the area ministers not included in the "village"? If the principal chooses not to continue the practice, the program is unattended by the parents and the community, one of the very reasons for the practice. If the principal chooses not to have the program due to nonparticipation, the system reprimands for poor community involvement. If the principal continues the program with prayer, the negative consequences could be great for the system.

Dilemma #2

Prayer at the opening of athletic events is a sacred norm for many schools within given communities. Not only is it delivered over the public address system, but it is also engaged in by team players in small huddles before and after games. The question that is in contrast to the law is echoed loudly from the parents. Comments from parents are inclusive of the following: "How dare one in leadership, the principal and/or the coach, not ask God to protect our children on the playing field or court?" "If this isn't allowed, then my child won't play." With comments such as these, what does the principal do? Allow prayer or not support team sports at school.

Dilemma #3

Prayer before meals, specifically lunch in the early grades, is yet another dilemma which the principal faces on a daily basis. It has, in the past, been the responsibility of the kindergarten and first grade teachers to instill the habit of "saying the blessing," as well as to ensure "learning the blessing" for children under their supervision. Again, parents regard this as a disgrace for a principal not to support, encourage, and even require the practice. It is considered as essential as teaching young children to wash their hands before meals. It becomes a burden for principals when parents begin to request kindergarten and first grade teachers for their children based on the teacher teaching students to say a prayer before lunch. The lunch prayer is considered by many parents to be part of the school curriculum in the early grades. On the other hand, suppose the principal is made aware that the parent of a particular student in one kindergarten classroom is opposed to prayer before lunch and asks the teacher to discontinue the practice and the teacher refuses because of the pressure from the other parents. The principal and teacher find themselves being ridiculed by proponents of prayer, as well as the oppositional parent.

Dilemma #4

The Gideon Bibles are yet another example that creates a dilemma for principals. In many rural schools with a large at-risk student population, the Bible received at school is not only expected, but almost essential and necessary. Why? Children at local churches are encouraged and expected to bring the Bible to Sunday School. Often they are counted, and rewards given, for bringing the Bible while in attendance. What happens when the impoverished child has not been given a Bible at school? The child doesn't have one and the result is a felt inadequacy and perhaps a lack of attendance at the local church. Parents, church members and ministers begin to question why this school hasn't issued or allowed distribution of this much needed resource to the most needy of children. It is expected by the community that the principal ensure school contact with the Gideons and that teachers ensure that certain "needy" students are given a Bible. How then can a principal and a teacher select a particular student, single that student out of the student body, and ensure a Bible is given and taken home without being concerned about violating the Constitution?

In summary, it must be emphasized that parents are vocal in their efforts to make sure religious traditions continue. Many administrators feel the pressure to succumb to the demands of the public they serve rather than adhere to the law. Either decision could result in loss of a job. It's walking the tightrope, looking ahead to see how far one might travel, and looking below to see how far one might fall, that makes the decision so challenging.

ETHICAL ISSUES FOR THE SCHOOL ATTORNEY

Education Law Association
48th Annual Conference
New Orleans, Louisiana
November 14-16, 2002

Presented by:
Richard J. Dickinson, General Counsel
Ohio School Boards Association
8050 N. High Street, Suite 100
Columbus, Ohio 43235-6482

Phone: 614-540-4000 ◆ Fax: 614-540-4100
e-mail: r_dickinson@osba-ohio.org

and

John P. Concannon, Esq.
3120 Lookout Circle
Cincinnati, Ohio 45208

Phone: 513-321-8233

This session is designed primarily for attorneys, but will be of interest to educators and administrators who deal with litigation or administrative proceedings in their school district or institution.

The session will be conducted in an interactive format, using the six hypothetical fact scenarios below to focus the discussion. The speakers will relate each scenario to the American Bar Association Model Rules of Professional Conduct, which is the basis for most states' disciplinary rules of conduct for attorneys.

Written analyses of each scenario under the Model Rules will be provided to session attendees with copies available to all interested conference participants.

Ethical Issues for the School Attorney

1. While enjoying a refreshing beverage at the 19th hole lounge, your best friend confides that he is hopelessly in love with Miss Issipy, the new guidance counselor in a school district you represent. He's got the ring and plans to "pop the question" this Saturday night after the big tractor pull. From board executive sessions you've attended, you know that Miss Issipy is suspected of a crime of moral turpitude in the district. *What can/cannot you tell your friend?*

2. At the board's request, you have prepared a memorandum addressing how the board of education should handle booster club revenues that support the district's athletic programs. Ms. Betsy Bruser has filed a lawsuit seeking district funding of a womens wrestling team. She seeks a copy of your memorandum under your state's open records law. The district argues the memo is protected by the attorney-client privilege. *Must the district produce the memorandum?*

3. At the annual convention of the state school boards association, Superintendent Sal Fish tells you the board is thinking about switching law firms. Sal says the board members, treasurer, himself and everyone's spouse would like to be your guests at Bistro Multo Buccos tomorrow night to discuss your interest. *How should you respond?*

4. You represent the Weesmal School District in a teacher termination proceeding. At the hearing before the board appointed referee, you present the case for the administration. At the next meeting of the Weesmal Board, you participate in the executive session deliberations of the board that results in a decision to terminate the teacher. The teacher's lawyer seeks to overturn the board's decision and accuses you of a conflict of interest. *Did you do anything wrong?*

5. After an exhilarating evening of playing the home version of *Wheel of Fortune* with friends, you step out on the deck with Sue Slick, a member of a board of education you represent. Sue casually says she would like some advice from "her attorney" and inquires as to the best method of correcting an expense form she submitted and collected upon in which she "mistakenly" billed the school district for four nights at a hotel, when she only stayed for two. *Can you advise Sue? Do you have a duty to inform the board of Sue's revelation? Can Sue prevent you from informing the board?*

6. You have recently hired a new associate in your law firm, Barry Brownose, who claims to be a whiz at issues regarding the Internet and electronic mail. He states emphatically that it is unethical for your office to communicate with officials of school districts you represent by unencrypted e-mail, because it does not insure privacy. *Does the kid-lawyer know what he is talking about?*

Academic Freedom:
A Precarious Balance

John A. LaNear
Argosy University
20 S. Clark St.
Chicago, IL 60603

Education Law Association
48th Annual Conference
New Orleans, LA
November 14-16, 2002

I. INTRODUCTION

Academic freedom is an elusive concept. Yet, many faculty members who purport to possess its protections believe they have a solid understanding of its nature, and of the individual rights secured by, academic freedom. In the world of the academy,[1] there is some consensus on the meaning of the term. Professional statements of academic freedom, though somewhat vague (and intentionally so), provide a common understanding of its basic principles. Different institutions adopt the tenets of these professional statements to varying degrees, and though there is always room for debate on the fringes of the freedom, but a commonality of understanding does permeate the professional academy. Judicial pronouncements of academic freedom, on the other hand, do not evidence such a universal genesis or conception of the notion.

The variance between the two conceptions of academic freedom – one professional, the other legal or constitutional - has created significant challenges to those claiming academic freedoms in the courtroom. Outside of the campus environment in which this freedom enjoys common understanding, iterations of the freedom can fall short of faculty expectations. Often, professional expectations of the protections afforded are unmet by judicial declarations of the constitutional basis for the "freedoms" available. Additionally, the lack of a unified understanding can lead to varied constructions of the strictures and foundation of the freedom and the rights that adhere to it.

The United States Supreme Court has discussed academic freedom in a variety of circumstances, leading to an assortment of declarations regarding the importance of such a freedom in a democratic society. But the Court's pronouncements regarding this freedom are vague and unstructured, offering little guidance to lower courts and litigants. Additionally, the Court has suggested, albeit inconclusively, that the freedom is entitled to some degree of Constitutional protection. As a result of these inconclusive pronouncements, some lower courts have been hesitant to afford the Constitutional protection alluded to by the Court.

---

[1] This paper provides a discussion of academic freedom in the context of higher education. All references to teachers, faculty or the academy are confined to the United States college and university environment unless otherwise specified. References to the academy are intended to include faculty and administrators at colleges and universities collectively.

Early academic freedom cases evaluated faculty rights to freedom from state encroachment. Under these circumstances, Court pronouncements of the importance and Constitutional basis of academic freedom were sturdy and more expansive. They declared the right on behalf of individual faculty members, colleges and universities, and the academy as a whole.[2] More recent cases in this vein, however, have pitted faculty members against their colleges and universities, leading to competing claims of academic freedom. This is a circumstance that may not have been foreseen by the Supreme Court as it proffered broad, open statements in support of a more universal academic freedom. These amorphous pronouncements offer little guidance to lower courts attempting to balance the rights of the faculty and the rights of the institutions. While the Court has discussed the issue of academic freedom in various settings, it has yet to directly evaluate the competing individual and institutional claims to academic freedom. As a result, the judiciary is left without a framework or structure in which to evaluate competing claims to academic freedom in the Constitutional context.

In this paper, I argue that, when the Court suggested that academic freedom was entitled to Constitutional protection, it did not originally intend to subjugate the rights of individual faculty to those of the collective institution. Significant changes in college and university structures over the past century have led to competing claims of academic freedom that now face the courts. In other words, the Court originally discussed academic freedom in the context of individual faculty members' rights, not institutional rights. I further argue that the changes in college and university structures, coupled with the broad Court pronouncements are leading to the diminution of individual faculty academic freedoms.

---

[2] For purposes of academic freedom jurisprudence, courts have not found meaningful distinctions between colleges and universities. Unless otherwise indicated, references to either colleges or universities in this paper are intended to include either or both institutional structures as they are commonly understood.

In part I of this paper, I review the historical foundations of American academic freedom, briefly outlining two professional declarations of the basic tenets of that freedom. I also discuss some of the prominent judicial or constitutional definitions of academic freedom propounded by the Supreme Court over the last 50 years. I examine the language utilized by the Supreme Court in several early "academic freedom cases" to flesh out the intended judicial meaning of the concept. In part II, after drawing some intermediate conclusions about the nature and scope of academic freedom in a constitutional context, I review more recent Court cases that support these conclusions. I then discuss the varying contexts in which academic freedom claims have arisen. In part III, I apply the principles elucidated by the Supreme Court (and more clearly enunciated by me in parts I and II of this paper) to a recent problem encountered by lower courts in academic freedom jurisprudence. I conclude with some remarks about the relatively bleak legal/constitutional future – as well as institutional future - of support for academic freedom in American universities, briefly discussing some of the changes in college and university structure over the past 50 years that threaten this vitally important tradition.

II. Part I: A Brief History of Academic Freedom

A. Professional Definitions of Academic Freedom

a. American Association of University Professors' 1915 Declaration of Principles

b. American Association of University Professors' 1940 Statement of Principles on Academic Freedom and Tenure

B. Constitutional Definitions of Academic Freedom

    a. Weiman v. Updegraff

    b. Sweezy v. New Hampshire

    c. Keyishian v. Board of Regents of the State University of New York

C. Recent Court Cases and Contexts

    a. Board of Regents v. Roth

    b. University of California Regents v. Bakke

    c. Regents of the University of Michigan v. Ewing

    d. University of Pennsylvania v. Equal Employment Opportunity Commission

D. Contexts for Existence of Academic Freedom

III. Part III: Erosion of Faculty Academic Freedom

A. Brown v. Armenti

B. Edwards. v. California University of Pennsylvania

C. Parate v. Isibor

IV. Conclusion

Unfortunately, an early misunderstanding of Justice Frankfurter's concurrence in Sweezy has led to a number of questionable decisions relating to individual faculty members' academic freedom. Cases are routinely being decided on the misunderstanding of this foundational case. As a result, the protections of academic freedom are to be found in the relationships of faculty members and their institutions. "To combat and redress all the myriad ways in which academic freedom may be undermined and thwarted will always require vigilant and determined self-help activity within the academic community itself. For this, the law will never be a substitute . . .

constitutional law can never be more than an occasional valuable ally in the struggle for academic freedom" (Murphy, 1963, p. 484).

References

American Association of University Professors (1915). 1915 Declaration of Principles

American Association of University Professors (1940). 1940 Statement of Principles on Academic Freedom and Tenure

Board of Regents v. Roth, 92 S.Ct. 2701 (1972).

Brown v. Armenti, 247 F.3d 488 (3rd Cir. 2001).

Byrne, J.P. (1989). Academic freedom: A "special concern of the First Amendment." Yale Law Journal, 99, 251-340.

Chang, A.W. (2001). Note: Resuscitating the constitutional "theory" of academic freedom: A search for a standard beyond Pickering and Connick. Stanford Law Review, 53, 915-966.

Dumas, D.M., McIntyre, C., & Zelenock, K.L. (1990). Parate v. Isibor: Resolving the conflict between the academic freedom of the university and the academic freedom of university professors. Journal of College and University Law, 16, 713-30.

Dyer, E. (2002). The authority to assign grades in public higher education: A 'third essential freedom' for instructors or institutions? West's Education Law Reporter, 162, 645.

Edwards. v. California University of Pennsylvania, 156 F. 3d 488 (3d Cir. 1998).

Euben, D.R. (2002). Academic freedom of individual professors and higher education institutions: The current legal landscape. http://www.aaup.org/Com-a/aeuben.HTM (9 April, 2002).

Fowler v. Board of Educ., 819 F.2d 657 (6th Cir. 1987).

Hofstadter, R. & Metzger, W.P. (1955). The Development of Academic Freedom in the United States. New York: Columbia.

Hiers, R.H. (1993). Academic freedom in public colleges and universities: O say, does that star-spangled First Amendment banner yet wave? Wayne Law Review, 40, 1-107.

Jacobson, J. (2001, May 11). Court says public university can fire professor for refusing to change a grade. The Chronicle of Higher Education, p. A-14.

Kaplin, W.A. & Lee, B.A. (1995). The Law of Higher Education, 3d. San Francisco: Jossey-Bass.

Katz, K.D. (1983). The First Amendment's protection of expressive activity in the university classroom: A constitutional myth. U.C. Davis Law Review, 16, 857-932.

Keyishian v. Board of Regents University of State of N.Y., 385 U.S. 589 (1967).

Leas, T. & Russo, C.J. (1994). Waters v. Churchill: Autonomy for the academy or freedom for the individual. West's Education Law Reporter, 93, 1099.

Murphy, W.P. (1977). Academic freedom – an emerging constitutional right. In Metzger, W.P. (Ed.), The Constitutional Status of Academic Freedom (pp. 447-486). New York: Arno Press.

O'Neil R. (2001). Free speech for professors: 2 court rulings sound new alarms. Chronicle of Higher Education, 47 (38), B24.

O'Neil, R.M. (1999). Academic freedom: Past, present, and future. In Altbach, P.G., Berdahl, R.O., & Gumport, P.J. (Eds.), American Higher Education in the Twenty-first Century: Social, Political and Economic Challenges (pp. 89-108). Baltimore: Johns Hopkins.

Parate v. Isibor, 868 F.2d 821 (6th Cir. 1989).

Pavela, G. (2001) A balancing act: Competing claims for academic freedom. Academe, 87, (6) 21-26.

Perkin, H. (1997). History of universities. In L. Goodchild & H. Wechsler (Eds.), The history of higher education (2nd ed.) (pp. 35-52). Boston: Pearson.

Peterson, R.M. (1990). Colleges and universities-Constitutional law: Professor's assignment of grades to students is symbolic communication protected by the First Amendment. North Dakota Law Review, 66, 297-316.

Rabban, D.M. (1990, Summer). Functional analysis of "individual" and "institutional" academic freedom under the First Amendment. Law and Contemporary Problems, 53-SUM, 227-301.

Rabban, D.M. (2001). Academic freedom, individual or institutional? Academe, 87, (6) 16-21.

Regents of the University of Michigan v. Ewing, 474 U.S 214 (1985).

Rosenberger v. University of Virginia, 515 U.S. 819 (1995)

Standler, R.B. (2000). Academic Freedom in the USA. http://www.rbs2.com/afree.htm (15 May 2002).

Sullivan, M.M. (1971). Academic Freedom in Historical-Legal Context. (Doctoral dissertation, Miami University (OH), 1971).

Sweezy v. New Hampshire, 354 U.S. 234 (1957).

University of California Regents v. Bakke, 98 S.Ct. 2733 (1978).

University of Pennsylvania, v. Equal Employment Opportunity Commission, 493 U.S. 182 (1990).

Whitehill v. Elkins, 389 U.S. 54 (1967).

Wieman v. Updegraff, 344 U.S. 183 (1952).

Infants, Toddlers, and Preschoolers: What's in the IDEA for Them?

Presented
at the
Education Law Association's 48th Annual Conference
New Orleans, LA
November 16, 2002

Mary Jane K. Rapport, PhD, PT
University of Colorado Health Sciences Center
Denver, CO

Basic Differences between Part B and Part C of the IDEA:

- Ages
- Eligibility criteria
- Services
- Focus of services
  - Child
  - Family/child
- IEP/IFSP
- LRE/Natural Environment
- Service systems
- Payment

Similarities between Part B and Part C of the IDEA:

- Referral to Eligibility:
  - Both the Part B and Part C systems are responsible to ensure that all eligible children are identified, located, and evaluated.
  - The evaluation process must objectively determine the child's abilities and needs.
- Planning for Services:
  - The Part B and Part C planning processes must be directed by a team, including the parents.
  - The plan must be individualized and describe the services to be provided.
- Transition:
  - The purpose is to ensure a smooth transition with no interruption in services.
  - Both Part C and Part B have responsibilities for smooth and effective transition out of Part C.
- Parent Involvement:
  - Parents are active decision-makers in both the Part B and Part C process.
  - Parents are involved in decisions related to identification, evaluation, placement, and service provision.
- Resolving Disagreements:
  - Both Part C and Part B have procedures to resolve disagreements between families and State early childhood and preschool systems.

- Priority is to resolve disputes in the least adversarial way possible beginning with mediation.

IDEA Reauthorization:

Watch for possible changes in these areas –

Use of public and private insurance
Financial burden on some families
Natural environments language (home-based v. center-based)
Mental health services for young children
Child care for young children with disabilities
Identification of infants and toddlers
State monitoring, assessment, and accountability

Recent Decisions:

Douglas County Sch. Dist. RE-1, 35 IDELR 295 (SEA CO 2001).

(Part B) Twins could not be placed in kindergarten solely based on their age when their parents wished for their children to remain in preschool.

Placement decisions cannot be based solely on a single criteria or factor. Consideration must be given to each child's unique needs and abilities. Parental preference can be neither the sole, nor predominant, consideration. In addition, birth date cannot be the sole factor used to determine placement when both programs met the LRE requirement.

Branford Bd. of Educ., 36 IDELR 20 (SEA CT 2001).

(Part B) Parents were reimbursed for a private preschool placement, auditory-verbal therapy, and transportation costs, and a FM audiological system was provided for the private preschool setting.

The IEP must consider language and communication needs, opportunities for communication with peers and professionals, and opportunities for direct instruction in the child's language or mode of communication. In this situation, a child who was profoundly deaf with cochlear implants was not provided with an IEP that would meet these needs as the school district did not have a preschool setting in which all the children could be role models of appropriate speech and language skills.

Lakewood Bd. of Educ., 35 IDELR 292 (SEA NJ 2001). TSE Feb. 8 pg. 22

(Part B) Parent was reimbursed for a unilateral private preschool placement after the school district failed to offer FAPE to a 3-year-old child with developmental delays.

The IEP must be specific enough so that parents know what services a child is going to receive and what goals and objectives will be addressed to help the child overcome areas of need. An IEP that is so general such that it addresses goals and objectives typical for almost any 3-5 year-old child has not met the criteria of individuality nor considered meeting the child's individual needs.

Caldwell-West Caldwell Bd. of Educ., 36 IDELR 118 (SEA NJ 2002).

(Part B) Parents were reimbursed for tuition costs associated with placement in a private mainstream preschool program. The school district was unable to prove that a preschool child with pervasive developmental disorder (PDD) could not benefit from a mainstream, or general education, setting. Furthermore, the district denied FAPE when the director of special services overturned the decision of the IEP team to offer OT and speech/language services at the private preschool day care center the child was attending.

Prior to removing a child from a general education setting, the district must demonstrate that the child was unable to achieve satisfactorily in that setting with appropriate supplementary aids and services.

Hampden-Wibraham Regional Sch. Dist., 37 IDELR 20 (SEA MA 2002).

(Part B) The school district was required to pay for an independent educational evaluation (IEE) for a 4-year-old child after the district did not agree to pay for the evaluation or notify the parents that they were going to initiate due process in objection to the request with 5 days.

IDEA regulations only require that a parental request for an IEE be addressed without unreasonable delay. There is no specific number of days or a time limit included in the federal regulations. However, Massachusetts' law requires a response from the district within 5 school days. The district's letter asking the parents how they wanted to proceed failed to meet the criteria of either paying for the evaluation or initiating due process to object to it within the 5-day period.

Stamford Bd. of Educ., 37 IDELR 29 (SEA CT 2002).

(Part B) Parents were reimbursed for two years of tuition at a private center for child development that utilized ABA discrete trial methodology. The IEPs offered by the school district in both the child's pre-kindergarten and kindergarten years failed to provide the child with a program in which he could make satisfactory progress.

The parentally selected methodology enabled the child with autism to make significant progress, while the child made little progress in the placement offered by the school district.

Fort Wayne Community Schs., 37 IDELR 82 (SEA IN 2002).

(Part B) A classroom observation of a specific child by an autism specialist is considered to be part of an initial educational evaluation and informed parental consent is required prior to conducting the observation.

Furthermore, while a district is not bound to deliver the services designated in a prior IEP from another location, the district is still required to provide an appropriate level of service to meet the needs of the child. The school district was required to provide 1 ½ hours of occupational therapy, since there was no evidence to show that the in-class occupational therapy services available to multiple students were specifically designed to meet the needs of this student.

SEX AND THE COMPUTER

Presented to the ELA 48th Annual Conference

David R. Friedman
Friedman Law Firm
Adjunct Professor, Ed.D Program
Edgewood College, Madison, WI
and
Stuart S. Mukamal
Assistant City Attorney, City of Milwaukee

As the principal of Students All Graduate Elementary School (SAGES), your third grade teacher, Ms. Goodteacher, asks to meet with you on a sensitive matter. You meet with her and she tells you that she saw pictures of young children in various states of nudity in Mr. Guy's desk when she was looking for a book list she had given him. Upon further questioning of Ms. Goodteacher, she tells you that there were two pictures that appear to be printed from a computer.

Each classroom, including Mr. Guy's room, has a computer for the teacher to use for instructional purposes and the computer is only to be accessed by the teacher. You have suggested that each teacher's computer be password protected.

You have no reason to doubt the sincerity of what you have been told by Ms. Goodteacher. Mr. Guy has been teaching for seven years and there is nothing in his past conduct to indicate any improper actions with students. Although not the best teacher, Mr. Guy has always been a responsible teacher and has had and continues to have a good relationship with his students.

How do you proceed from here?

IMMEDIATE ISSUES

1. Is there any right way to proceed?
2. Why and what are you going to investigate?
3. Are there any documents you need to look at before starting your investigation?
4. Do you talk to him or search his desk and/or his computer as the next step?
5. If you are going to conduct a search, is it by you or with help from the police or some other outside entity?
6. Can you force him to talk, and what can you do if he refuses to talk?

IS THERE A RIGHT WAY TO PROCEED?

There is no one right way to proceed. Events are intertwined and plans often and quickly change. You do need to plan an approach before you start. Carpenters have an adage that says measure twice before you cut. For you - - think twice before you proceed.

WHY AND WHAT ARE YOU GOING TO INVESTIGATE?

Has Mr. Guy done anything wrong? Has he possibly violated any school board policy or procedure? Has he violated any state or federal law? Do you know whether he printed those pictures, someone gave them to him, or someone planted them in his desk? Does Mr. Guy even know about the photos? Could Mr. Guy have confiscated the photos from a student(s) or others?

Most schools have an "acceptable use" policy for employee use of the computer. Does your school district have such a policy? Does that policy prohibit display, storage or printing of pictures of nude children?

Wis. Stat. § 948.12 prohibits the possession of child pornography and prescribes criminal penalties for a violation. Most, if not all, states have similar statutes. Two federal criminal laws might also be involved. 18 U. S. C. § 2252A(a)(2)(A), Receiving Materials Containing Child Pornography and 18 U.S. C. § 2252A(a)(5)(B), Possession of Material Containing Child Pornography.

You have decided that the best way to proceed is to call in Mr. Guy and talk to him. What should you do when you contact him? (Assume there is a collective bargaining agreement with a "just cause" standard for disciplining an employee.)

Mr. Guy is probably entitled to have union representation when you talk to him. *NLRB v. Weingarten, Inc.* 420 U. S. 251, 88 LRRM 2689 (1975) adopted by the Wisconsin Employment Relations Commission in *City of Milwaukee*, Dec. Nos. 14873-B and 14889-B (WERC, 8/80). Most states with public-sector collective bargaining laws have also adopted *Weingarten*.

These cases provide that an employee may refuse to participate in an investigative interview without union representation where the employee reasonably believes that the interview may result in discipline. The right only arises where the employee requests representation and he can participate in an interview without a representative if he forgoes his right to request one. The employee must reasonably believe the interview will result in discipline and "reasonable belief" is measured by objective standards. The employer has no obligation to continue with an investigative interview once union representation is requested, and generally, the employer can choose to terminate the interview if it does not wish the involvement of union representation. (Be sure to check your state law on this point). The Employer does not have to justify its refusal and can continue on its investigation without questioning the employee. The employee then forgoes any benefits that may be derived from participating in an investigatory interview.[1]

Also, check your collective bargaining agreement to determine whether there is any language on this subject. Even if there is no collective bargaining agreement and no union, the employee's rights in this regard may be just as extensive. The National Labor Relations Board has ruled that non-unionized employees have a right to have a coworker present to assist them at an investigatory interview that the employee reasonably believes might result in disciplinary action. *See Epilepsy Foundation of Northeast Ohio v. N.L.R.B.* 268 F.3d 1095 (D.C. Cir. 2001)

What happens if Mr. Guy does not cooperate with you? (Later this outline will cover the topic of what happens if he remains silent). What do you do next?

CAN THE EMPLOYEE'S DESK AND/OR COMPUTER BE SEARCHED?

Remember, an employee can always consent to a search so be sure to ask the employee to agree to the search. This presentation will focus upon what to do if consent is not obtained.

---

[1] Query: how does the employee know that the interview may result in discipline? Therefore, as a practical matter, many employers advise the employee of the right to union representation.

What are you going to search? There are different things to consider depending on what is going to be searched. Who will conduct the search? Depending on who conducts the search there may be different legal standards involved.

What will be searched? His desk, file cabinet, computer, and/or his backpack?

The lead U.S. Supreme Court case for searching a public employee's office, desk and file cabinet without first obtaining a search warrant is *O'Connor v. Ortega*, 480 U. S. 715, 1 IER Cases 1617 (1987). The hospital where Dr. Ortega was employed entered his office a number of times and seized several items from his desk and file cabinets. The Court had to decide two questions. The first question was whether a public employee had a reasonable expectation of privacy in the employee's office, desk, and file cabinets at the employee's place of work. The Court concluded that whether such an expectation applied to any particular place or thing depended upon "societal expectations" as determined on a case-by-case basis.

The second question concerned the appropriate Fourth Amendment standard for a search conducted by a public employer in those areas of the workplace in which the public employee is found to have a reasonable expectation of privacy. The workplace includes those areas and items that are related to work and are generally with the employer's control such as offices, desks, and file cabinets. These areas remain part of the workplace context even if the employee has placed personal items in them. The appropriate standard for a workplace standard does not necessarily apply to a piece of closed personal luggage, a handbag, or a briefcase that happens to be within the employer's business address.

The Supreme Court found that in Dr. Ortega had a reasonable expectation of privacy to some extent in his desk and file cabinets because Dr. Ortega did not share his desk or file cabinets with any other employees. Having made this determination, the Court had to determine what was the proper Fourth Amendment standard for the search.

The Court determined that a warrant was not necessary where a work-related search was merely incident to the primary business of the agency. It then moved on to the question of whether the "probable cause" standard was the appropriate standard for the search. Because the search of Dr. Ortega's office was either a non-investigatory work-related intrusion or an investigatory search for evidence of suspected work-related employee misfeasance, the court confined its decision to only these two types of employer intrusions.

Here, the Court begs the question: for what purpose is the employer conducting the search? Is it to gather evidence for a future criminal prosecution, or for an employee disciplinary action based upon violation of either a criminal statute or an employer policy (such as an "acceptable use" policy)? The answer may implicate the effectiveness of the search and may raise double-jeopardy issues, to be discussed later. The Court also stated there was not an expectation that a public employer need be knowledgeable about the niceties of "probable cause" when the search is not used to gather evidence of a criminal offense.

The Court eventually held that a public employer intrusion on the constitutionally protected privacy interests of government employees for a non-investigatory, work-related purpose, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances. Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider wither the action was justified at its inception; second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.

Ordinarily, a search of an employee's office by a supervisor will be justified in its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a non-investigatory work-related purpose such as to retrieve a needed file.

What happens if you also want to involve the school's police liaison officer because either you are uncomfortable doing the search or there is possible criminal conduct involved? What standard applies to the search and does it make any difference? The answer to the second part is that it might make a difference as to what evidence obtained from the search can be used against the employee in future proceedings.

The answer to what standard applies to a police liaison (resource officer) search of a school employee has not been answered in Wisconsin. There is an answer for the question when there is a search of a student suspected of carrying a dangerous weapon on school grounds by a police officer at the request of, and in conjunction with, school authorities. In that situation, the Wisconsin Supreme Court held that the "reasonable grounds" was the proper standard.[2] (Sometimes that standard is also labeled "reasonable suspicion"). The Court stated that, in contrast, a police investigation that includes the search of a public school student which is initiated by police and conducted by police would be covered by the "probable cause" standard.[3]

The practical aspect of the difference of standards concerns the quantum of facts needed to conduct or initiate the search. The higher the standard, the more facts justifying the search are needed before the search can be conducted. There are three ways an employee can attack the search. First, if the employee is prosecuted for a crime, the employee can seek to have the evidence suppressed claiming an improper search under the U.S. Constitution's Fourth Amendment prohibition against unreasonable search and seizure. Second, the employee can attempt to sue the school claiming a violation of 42 U.S.C. § 1983 as well as the Fourth and perhaps the Fourteenth Amendments. Such a lawsuit seeks damages against the employer. The third way is to use the just cause standard in a collective bargaining agreement or similar document and claim the investigation was not conducted properly.

---

[2] *In the Interest of Angelia D. B.* 211 Wis. 2d 140, 564 N.W.2d 682 (1997)

[3] But see *State of New Hampshire v. Joseph Heirtzler* 789 A.2d634 (2002) where the court found an agency relationship existed between police and school officials that conducted the search of a student, and thus, school officials were required to adhere to the same procedural safeguards as the police.

Is there enough information to proceed with a search of Mr. Guy's desk? His computer? It is a very close call. Does your District have a policy allowing searches of a desk, file cabinet, or computer? Does your District have a policy allowing audits, inspections or monitoring of Internet usage? Are there specific court decisions in your state addressing whether a search can be initiated, how it may be conducted, or to what extent evidence obtained can be used? All of these factors play a role in what you can do and the wisdom of the particular course of proceeding that you choose.

MR. GUY REFUSES TO TALK WITH YOU

Assume for further discussion, your search of Mr. Guy's computer turned up 20 downloaded pictures of nude children. You want to talk to Mr. Guy and his representative about what you have found. Mr. Guy refuses to answer any of your questions. Can you use his silence as an admission or inference of his guilt?

There are two issues involved. The first is his right to remain silent. The second is whether the school is entitled to draw an adverse inference from Mr. Guy's silence.

Because there are potential crimes involved, Mr. Guy has the right to remain silent unless granted immunity from criminal prosecution by the school. *Lefkowitz v. Cunningham*, 431 U.S. 801, 806, 97 S. Ct. 2132 (1977). "We now hold the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and it extends, to all whether they are policemen or other members of our body politic." *Garrity v. State of New Jersey*, 385 U.S. 493, 500, 87 S. Ct. 616, 620 (1967). *See* also, *Gardner v. Broderick*, 392 U.S. 273, 276, 278-279, 88 S. Ct. 1913 (1968).

The U. S. Supreme Court in *Baxter v. Palmigiano*, 435 U.S. 308, 316, 96 S. Ct. 1551, 1557 (1976) had the following to say on this point:

> As the Court has often held, the Fifth Amendment 'not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.'

The Wisconsin Supreme Court has adopted the following as guidance in this area:

> A public employer may discharge an employee for refusal to answer where the employer both asks specific questions relating to the employee's official duties and advises the employee of the consequences of his choice, i. e., that the failure to answer will result in dismissal but that answers he gives and fruits thereof cannot be used against him in criminal proceedings. *Oddsen v. Board of Fire and Police Commissioners,* 108 Wis. 2d 143, 164, 321 N.W.2d 161, 172 (1982).

Of significance and very unique is the Seventh Circuit's decision in *Atwell v. Lisle Park District*, 286 F.3d 987, 18 IER Cases 901(7 Cir., 2002) where the court stated that "the government employer who wants to ask an employee potentially incriminating questions must first warn him that because of the immunity to which the cases entitle him, he may not refuse to answer the question on the ground that the answers may incriminate him." 286 F.3d at 990; *citing United States v. Devitt*, 499 F.2d 135, 141 (7 Cir., 1974) and *Confederation of Police v. Conlisk*, 489 F.2d 891, 894 (7 Cir., 1973).

The Seventh Circuit recognized that two other Circuits have rejected this view, the issue expressly left open by the Fourth and Tenth Circuits and followed by none. *See, Gulden v. McCorkle*, 680 F.2d 1070 (5 Cir., 1982) (holding that an employee may be discharged for refusal to submit to a polygraph examination on the issue of whether he telephoned a bomb threat to his employer during working hours; however the court cautioned that the result might be different if the employee has been specifically requested or directed to waive constitutional privileges under pain of discharge from employment); *Hill v. Johnson*, 160 F.3d 469 (8th Cir., 1998) (county sheriff held entitled to require officer to answer questions about disappearance of photograph from the officer's desk or forfeit his job without violating his Fifth Amendment privilege against self-incrimination); *Wiley v. Mayor and City Council of Baltimore*, 48 F.3d 773 (4 Cir., 1995) and *Grand Jury Subpoenas Dated Dec. 7 and 8 v. United States*, 40 F.3d 1096 (10 Cir., 1994). So you may want to consult the state of the law in your jurisdiction.

What inference, if any, can the School draw from Mr. Guy remaining silent? The School can draw an adverse inference when an employee refuses to testify in response to probative evidence offered against the employee. If the School has independent evidence that the employee has engaged in misconduct, the School may constitutionally consider the employee's silence as additional supporting evidence. In short, where there is other evidence of misconduct, an employee's silence may properly become an additional factor pointing towards a guilty finding. *See Baxter v. Palmigiano*; *Atwell v. Lisle Park District, supra*, 286 F.3d at 991 (drawing an adverse inference from invocation of Fifth Amendment rights is permitted in civil cases).

However, the converse is also true. An adverse decision may not be based solely upon a party's invoking the Fifth Amendment privilege. Although invoking the Fifth Amendment may arouse suspicion, it cannot establish by itself the disputed fact. If the School improperly draws an adverse inference and if that inference contributes to disciplinary action against the employee, subsequent criminal prosecution of the employee may be compromised.

COORDINATION WITH LAW ENFORCEMENT

Assume that the School has gathered enough information to proceed with a disciplinary hearing against Mr. Guy while the police are also conducting an investigation. Does the School have to wait until the criminal matter is done to go forward? NO. Nothing prevents the School from going forward with its own disciplinary process. However, the School needs to be careful no to undertake action that impairs a criminal investigation or subsequent prosecution of the offending employee.

CLAIMS OF DOUBLE JEOPARDY

What about Mr. Guy's potential claim of double jeopardy? Make sure you check your state's cases. The U.S. Supreme Court in *Hudson v. United* States, 522 U.S. 93, 118 S. Ct. 488 (1997) *overruling United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892 (1989) and the Second Circuit in *SEC v. Palmisano*, 135 F.3d 680 (2 Cir., 1998) have provided guidance in this area. *Hudson* represented a significant narrowing of the double-jeopardy doctrine in the context of parallel criminal and non-criminal (civil, administrative, or municipal forfeiture) proceedings against the same offender.

The Double Jeopardy clause protects against multiple *criminal* punishments for the same offense in successive proceedings. It does not necessarily prohibit the imposition of multiple sanctions that might be construed as "punishment." Nor does it prohibit imposition of both civil and criminal penalties for the same offense, even in successive proceedings. "Jeopardy" attaches only upon imposition of criminal punishment. *Breed v. Jones*, 421 U.S. 519, 528, 95 S. Ct. 1779, 1785 (1975). The question thus becomes whether a particular punishment is criminal or civil.

Initially this is a matter of statutory construction, i.e. determining the intent of the legislature. The Supreme Court has stated that one must first ask whether the legislature in establishing the penalizing mechanism, indicated either expressly or impliedly, a preference for one label or the other. Even in those cases where the legislature has indicated an intention to establish a civil penalty, further inquiry must be made to determine whether the statutory scheme is so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. As respects this latter determination, there are seven factors that were set out by the Court in *Kennedy v. Mendoza-Martinez* 372 U.S. 144, 168-169, 83 S. Ct. 544, 567-568. These factors are:

1. Whether the sanction involves an affirmative disability or restraint;
2. Whether it has historically been regarded as a punishment;
3. Whether it comes into play only on a finding of *scienter* (intent);
4. Whether its operation will promote the traditional aims of punishment-retribution and deterrence;
5. Whether the behavior to which it applies is already a crime;
6. Whether an alternative purpose to which it may rationally be connected is assignable for it; and
7. Whether it appears excessive in relation to the offense.

The Court also stated "[i]t is important to note, however, that 'these factors must be considered in relation to the statute on its face,' . . . and 'only the clearest proof' will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty . . . ." *Hudson v. United States, supra*, 522 U.S. at 100, 118 S. Ct. at 493.

Clearly, it is now quite difficult to successfully maintain double-jeopardy contentions in the context of investigation or discipline of employees (or students) for conduct also constituting a criminal offense. In one leading case, the University of Wisconsin-Oshkosh punished a student for violation of its Student Code of Conduct while the City of Oshkosh prosecuted the student for disorderly conduct. The student claimed the City's prosecution constituted double jeopardy. The Court rejected that claim in *City of Oshkosh v. Winkler*, 206 Wis. 2d 538, 557 N.W.2d 464 (Ct. App. 1996). [4]

> The Wisconsin Supreme Court recently analyzed the double jeopardy clause in *State v. Carpenter*, 197 Wis. 2d 252, 541 N.W.2d 105 (1995). There, the court explained that the determination of whether a sanction constitutes punishment triggering the double

---

[4] This case was decided before the *Hudson* decision which, as earlier noted, overruled the *Halper* case (*United States v. Halper*, 490 U.S. 435, 109 S. Ct. 1892 (1989)).

> jeopardy clause depends on the purpose served by the sanction. Id. at 264, 541 N.W.2d at 109 (citing *Halper*, 490 U.S. at 447 n. 7). If the principal purpose of a regulation is punishment, retribution or deterrence, then that regulation is a sanction which triggers double jeopardy protection. See *Id.* at 264, 541 N.W.2d at 109-10. *Winkler* at 543.
>
> The court then concluded as follows:
>
> However, based on the legislative evidence that the purpose of the university rule is to maintain institutional order, we conclude that the university's disciplinary action is not a punitive sanction triggering the double jeopardy clause. The plain language of § UWS 17.01 tells us that the purpose of these administrative sanctions is to "preserve the orderly processes of the university." Faced with such language, we are not persuaded that the university's student discipline process may only be characterized "as a deterrent or retribution." See, *Carpenter, 197* Wis.2d at 264, 541 N.W.2d at 110 (quoted source omitted). *Winkler* at 545.

Following *Hudson*, the difficulty of asserting double-jeopardy claims became even more apparent. *See*, the following cases: *Nestorenko v. Arkansas Board of Chiropractic Examiners*, 76 Ark. App. 561, 69 S.W.2d 459 (2002) (holding that imposition of administrative sanctions against chiropractor for violation of regulations against misleading advertising did not constitute "punishment" under *Hudson* double-jeopardy analysis since the goal of the administrative sanction was remedial, not punitive, i.e. to protect the public from harm); *Matter of Krystal Nicole Phillips*, 128 N.C. App. 732, 497 S.E.2d 292 (1998) (holding that a student suspension for theft of school cash did not constitute "punishment" that would bar prosecution of the offending student in juvenile court for the same theft).

In contrast, however, *see People v. Hanson*, 23 Cal 4th 355, 1 P.3d 650 (2000) (holding that a statutory "restitution fine" imposed on top of a criminal conviction constitutes "punishment" for purposes of double jeopardy). For a good general discussion of the evolution of double-jeopardy jurisprudence in the school-discipline context, *see* Thomas R. Baker, *Criminal Sanctions for Student Misconduct: Double Jeopardy Litigation in the 1990's*, 130 Ed. Law. Rep. 1 (Dec. 1998).

Obviously, whether double-jeopardy consideration may be a matter of concern in any particular case will depend heavily on the specific facts of that case. In the context of computer misuse, it would clearly be advantageous for a school to make sure that its computer use policies contain language that speaks to institutional purposes and that outlines its objectives aside from that of simply punishing violators. This may serve to minimize the possible impairment of criminal proceedings against offending employees on double-jeopardy grounds.

SUMMARY

The issues associated with this type of situation are complex and require careful actions. The purpose of this material is **not** to stop you from taking action, but rather to alert you to problematic areas so you can avoid the pitfalls.

Sources and Effectiveness of Legal Training for Educational Administrators

Presented by:

Brenda Kallio
Texas A&M University-Commerce

Liliana Valadez
Dallas Independent School District

48th Annual Education Law Association Conference
November 14-16, 2002
New Orleans, LA

Due to the complexity of issues prevalent in the arena of public education, educators must be well-versed in their knowledge of legal issues impacting the operation of schools (Kemerer & Walsh, 2000; Petzko, 1998; Reutter, 1994; and Shoop & Dunkee, 1992). "Educational law is a fundamental and critical dimension of the knowledge base possessed by effective and successful school principals" due to complex challenges associated with the school setting (Sperry, 1999). With the increased and ever-changing laws relating to topics such as special education, bilingual education, corporal punishment in addition to constitutional and statutory rights of students, teachers and parents, knowing the laws applicable to these legal issues is critical in reducing the high cost of litigation.

For the most part, a void exists prior to 1980 regarding the knowledge that educators had about laws that impacted public education. However, as the need for this knowledge increased, the number of research studies has also increased.

There is no mistake as to the need for educators to be familiar with legal issues confronted within the operation of schools. Educators have confirmed this need through self-reflection. School administrators and principals not only feel inadequately informed about the laws affecting public education, they strongly confirm the need to be informed (Kerrigan, 1987). One Massachusetts study reported that 90% of the 142 respondents to a questionnaire felt that educators should have a command of school law (Hillman, 1988).

Perceptions and Attitudes vs. Knowledge

A few of the research studies reviewed analyzed the relationship of an educator's attitudes or perceptions of the law with their actual knowledge of the law. Researchers have attempted to link low knowledge levels with low perception or attitudes of law. Risinger (1989) found a positive correlation between attitudes toward corporal punishment and knowledge of related laws of Texas school principals. In studying the knowledge of Iowa public school board members, school administrators, secondary school teachers and twelfth grade students and their attitudes regarding selected human rights guaranteed by the Bill of Rights, it was determined, not surprisingly, that as knowledge levels improved, attitude levels also increased (Karam, 1993). In addition, "results suggested that respondent groups did not have adequate knowledge of the United States Constitution's Bill of Rights." Similarly, a slight correlation was determined between attitudes toward the law and knowledge of certain landmark legal cases of school administrators in Ohio (Barr, 1984). In this study, administrators had only a "fair knowledge" of the legal cases contained in the survey, citing a total mean score of 7.12 out of a possible 10. Inadequate knowledge was not the only finding of a study measuring teachers' knowledge of students' rights to due process and privacy (Kuck, 1992). A "chain effect" association was noted in that teachers' legal knowledge, their attitudes and their classroom practices were linked. Knowledge influenced attitudes, and in turn, attitudes affected practices. A recent study assessed the perceptions and knowledge of special education law among North Carolina Principal Fellows (Davidson, 1999). A majority of the Principal Fellows did not believe they had sufficient knowledge of special education law. In addition, findings from the questionnaire revealed that they had "insufficient levels of knowledge" of the IDEA provisions. Results in these studies not only reflect the lack of confidence that public school administrators and teachers have regarding their knowledge of educational legal issues, but confirm the relationship that their perception and attitudes have on their actual law knowledge. Although administrators recognize their weakness in this area, substandard knowledge levels still prevail.

Generic Law Studies

Research studies conducted to measure the level of knowledge pertaining to school law have consistently confirmed that educators lack proficiency in this area. In Michigan, 131 educators tested were unfamiliar with the laws that related to education (Souve, 1986). Also in Michigan, a study assessing educators' knowledge in 11 legal areas found that respondents were "uniformly uninformed" (Johnson, 1985). The data indicated that "educators' knowledge of the law as it applies to students range from marginally accurate to markedly inaccurate." In another study focusing on the knowledge of constitutional law, Florida educators were deficient in their knowledge pertaining to due process, freedom of expression, search and seizure, flag salute and religion (Steele, 1990). Only 33 of 505 Georgia teachers scored higher than 70% correct on a 45 item test assessing their knowledge of school law, including their professional and personal rights and liabilities (Paul, 2001). Teachers in Tennessee did not possess a fundamental knowledge of school law necessary to (1) maintain a safe school environment, (2) protect themselves from possible tort liability litigation, nor (3) understand students' rights on and off school grounds (Moore, 1997). Educators, parents and students in California's secondary schools were "well below a desired norm of educational law knowledge" (August, 1984). A study by Millerborg (1991) examined legal and ethical considerations used by school principals and superintendents nationwide while making important decisions. Findings indicated that administrators often made ethical, but illegal decisions in situations of ethical/legal conflict. Finally, in a study of New York secondary school administrators and their knowledge of recent Supreme Court decisions affecting school practice, educators lacked an adequate knowledge base in several areas (Chapman, 1986). These studies provide a clear indication that educators need a better understanding regarding laws impacting their daily activities of educating students.

Special Education Law

With the enactment of Public Law 94-142, IDEA, ADA and Section 504 of the Rehabilitation Act of 1973, special education has profoundly impacted the education of a special population of students (Boyle & Weishaar, 2001). Due to these federal mandates, several studies have focused on the legal knowledge of public school administrators in this area. Surprisingly, with these important laws impacting the education of special needs students and the potential litigation issues at stake, administrators continue to lack an understanding of the pertinent laws mandating specific implementation in the schools. In El Paso, Texas, campus administrators did not have a sufficient knowledge base in special education legal issues, namely in compliance and procedural requirements of the law (Nardone, 1999). In New York State, a study investigated the extent to which school administrators understood and applied the law governing discipline of handicapped students (Bagnato, 1990). Respondents were asked to apply their knowledge in hypothetical situations based on case law. Significant gaps were demonstrated in their understanding of key issues related to the discipline of handicapped students. Superintendents and principals in Illinois were found to have "poor or inadequate" knowledge of procedural due process rights of handicapped children (Schmidt, 1987). Survey results of responses from public school administrators to questions related to special education law disclosed an unsatisfactory knowledge level with 74% of respondents scoring below 70% on test items (Robertson, 1996). In Ohio, special education administrators were "less than knowledgeable" regarding education related law (Russell, 1990). With the increasing legal mandates surrounding the issue of educating students with special needs, educators continue to lack a knowledge of special education-related laws.

Specific Topic Studies

A few studies concentrating on a specific area of law were located in the literature. One study examined Ohio school administrators' knowledge of constitutional and tort law regarding student-on student violence (Pauken, 1997). A mean score of 25.23 out of a possible 40 revealed a need to increase their knowledge level. Similarly, one-third of public school principals in Virginia failed to achieve minimal competency with respect to their knowledge of search and seizure law (Kalafatis, 1999). Also in Virginia, a study of principals and teachers assessed their knowledge of tort liability law for negligence in the selected area of duty and standard of case, specifically in the area of sexual misconduct between professional school employees and students (Daley, 1994). "The conclusion reached....was that teachers do not have a working knowledge of tort liability for negligence." Public high school administrators' level of knowledge regarding requirements of due process for students as mandated in the United States Supreme Court case, Goss v. Lopez, was the focus of one study in Nevada (Gascue, 1982). Results not only indicated a gap in their knowledge level, but also found that administrators were more likely to rely on school district procedures than their knowledge of the law. As these studies have revealed, educators' limited knowledge with respect to general laws, special education laws and the various specific areas related to the education of public school students plagues the profession.

Teacher Preparation/Staff Development Implications

Several of the studies previously discussed in this review of the literature cite the need to improve teacher preparation and ongoing staff development programs. It is clear that school administrators should be adequately prepared and continue to frequent learning opportunities in legal issues (Carmon, 1982). In a study of fifty-six superintendents in Louisiana, school law was ranked as the most important course in principalship-preparation curriculum (Hardin, 1998). Similarly, Lester (1993) interviewed 80 educators in New York and discovered that most respondents recommended that school law be a focus in administrator preparation programs. In Alabama, principals reported that laws regarding students' rights were most important for pre- and inservice training (Crockett, 1994). In studying the effectiveness of secondary educational administration preparation programs at Kansas Regents' Universities, it was found that additional emphasis is needed in school law (Jolly, 1995). In a study focused on administrator preparation programs in Texas, the effectiveness of state universities in their preparation of administrators of special education programs acquiring the required Mid-Management certification, revealed a need to include and maintain training in legal issues (Bravenec, 1998).

Sacken (1987) goes as far as to offer suggestions relating to the content of school law instruction in administrator preparation programs of colleges of education. Although the need for training is apparent, some sessions offered are scarcely attended by administrators who have many pressures and demands which capture much of their time and attention (Lattimore, 2001). As shown in these studies, legal knowledge is important for educators, thus, teacher preparation and staff development programs must be improved to address this need.

Resources

Access to resources is a critical factor in enhancing the legal knowledge of public school stakeholders. As noted in one study, a significant relationship exists between the information sources school administrators used and their knowledge and ability to apply laws relating to discipline (Bagnato, 1990). The findings suggest that some information sources may provide a more effective means of reaching school administrators. The size of the school district was also a significant factor related to the importance administrators assigned to selected information sources. In an analysis of sources of legal information for New York administrators, resources usually consulted were "generally both accurate and comprehensive, which suggests that the sources were not responsible for the administrators' misinformation" (Chapman, 1986). This suggests that access, not accuracy is a barrier to educators' legal knowledge. To address this concern, Armenta (1999) provides an extensive list of websites accessible for information that educators can access in order to stay current in school law.

Summary

Based on the review of literature in the area of what school administrators know regarding legal issues impacting the profession of educating the young people attending public schools, the following conclusions can be made. First, educators nationwide do not feel they know enough about the laws governing the educational process. A need to improve their knowledge level definitely exists. Secondly, as laws continue to mandate the behavior of educators, knowledge levels remain at substandard levels. Through findings in these studies, critical implications are made as to the need to improve the way in which college and universities prepare educators for the task of educating students legally. Implications for school districts also exist in that their staff development programs should include a mechanism for continuous growth of educators' legal knowledge base. Finally, resources should be identified and their effectiveness should be rated to provide educators access to reliable information.

Methodology

Questionnaires containing six areas of demographic inquiry: gender, job classification, areas of certification/degrees held, years of administrative experience, number of law classes taken at the university level, and a self-reported number representing their overall personal knowledge of public school law were mailed to randomly selected K-12 public school administrators in the state of Texas. In addition to demographic information, the administrators were asked to rate a variety of legal resources by cost, ease of access, readability, relevance, and accuracy. Types of legal resources included in this study were electronic web-sites, human resources, journals/newsletters, professional organizations, and professional conferences.

Participants were also asked to rate themselves in 14 special areas of legal knowledge. (The rating scale for all dependent variables ranged from 1-5 with 5 being the highest rating and 1 being the lowest.)

Researchers had intended to use analysis of variance to test the results of this study, but few responses in critical categories did not allow for post hoc evaluation. Therefore, the results of this study were analyzed using descriptive statistics.

Results

Disaggregation by Dependent Variable

Within the electron/web-site resource group, Lexis Nexis (*n* = 3) had an overall mean of 4.3, and was consistently ranked in the lower half of electronic resources for all areas tested. West Law (*n* = 4) was the lowest rated electronic resource in the areas of accessibility, readability, relevance, and accuracy. With a mean score of *M* = 3.5, West Law was ranked as the least valuable electronic resource. The small number of persons (*n* = 3, *n* = 4 respectively) reporting use of these two electronic resources may have had an adverse affect on the importance of these means. The low number of persons reporting use of the AASA web page (*n* = 5) may also have had an effect on the AASA's overall mean and rankings. However, the low response rate for these three electronic resources, West Law, Lexis-Nexis, and AASA, may be indicative of their limited usefulness to Texas public school administrators.

Of the remaining six electronic resources tested, the TEA website (*n* = 53) has the highest number of reported users (78%). However, the individual means for accessibility (*M* = 4.4), readability (*M* = 4.4), relevance (*M* = 4.4), and accuracy (*M* = 4.5) do not combine to place this electronic resource among the most valued electronic resources tested. Within the category of electronic websites, those representing Texas based professional organizations (TASB, TASA, and TASSP) consistently ranked higher than the electronic websites generated by national organizations (ASCD and NASSP).

Table 1
Mean Scores and Ranking for Electronic Resources

	Respondents		Cost		Accessibility		Readability		Relevance		Accuracy		
Electronic Sources	Avg # of Respondents per Resource	Rank	Mean	Rank	Mean	Rank	Mean	Rank	Mean	Rank	Mean	Rank	Grand Mean
West Law	4	8	xx	x	3.5	9	3.5	9	3.5	9	3.5	9	3.5
Lexis-Nexis	3	9	xx	x	4.5	5	4.0	7	4.3	5	4.3	5	4.3
TEA	53	1	xx	x	4.4	7	4.0	7	4.2	7	4.5	3	4.3
TASB	35	2	xx	x	4.7	1	4.3	3	4.4	2	4.7	1	4.5
TASA	30	3	xx	x	4.7	1	4.3	3	4.5	1	4.6	2	4.5
AASA	5	7	xx	x	4.6	3	4.1	6	4.3	5	4.1	8	4.3
NASSP	18	6	xx	x	4.5	5	4.3	3	4.2	7	4.3	5	4.3
ASCD	20	5	xx	x	4.4	7	4.4	1	4.4	2	4.3	5	4.4
TASSP	25	4	xx	x	4.6	3	4.4	1	4.4	2	4.4	4	4.4

* xx Participants were not asked to rate these resources for cost as most of them have free web access.

Of the five resources listed in the "Human Resources" section of the survey, attorneys had the highest number of respondents (*n* = 43). Attorneys ranked high in accuracy (*M* = 4.6), and relevance (*M* = 4.6). Attorneys, however, were perceived to be costly (*M* = 3.6) and somewhat difficult to understand (*M* = 4.1).

The Human Resource with the highest grand mean is “Another Administrator” (*n* = 38). In this study, other administrators were seen to be the most accessible human resource (*M* = 4.5) and the most cost effective (*M* = 4.7) human resource. The data from this study does indicate that legal information obtained from administrators was rated as having a low accuracy rate (*M* = 4.0).

Nine of the 68 study participants reported that liaisons with staff at the Educational Service Centers (ESC) were exceptional (scores of 5 in all areas). Most participants, however, had mixed ratings for the ESCs and one participant wrote that the ESC was of “no help” in addressing legal issues. Overall, the staff members at the ESCs were scored at *M* = 3.9 making it the second lowest ranked human resource for legal information.

The grand mean for Private Consultant (*M* = 2.8) lies considerably outside the range of the other Human Resource components [attorney (*M* = 4.1), another administrator (*M* = 4.4), ESC staff (*M* = 3.9) and Texas Education Association staff (*M* = 4.2)]. Participants in this study rated Private Consultants especially low in the areas of cost (*M* = 2.2) and accuracy (*M* = 3.0). Private Consultants ranked last in all five areas tested.

Table 2
Mean Scores and Rankings for Human Resources

	Respondents		Cost		Accessibility		Readable		Relevance		Accuracy		
Human Resources	Number of Respondents per Resource	Rank	Mean	Rank	Mean	Rank	Mean	Rank	Mean	Rank	Mean	Rank	Grand Mean
Attorney	43	1	3.6	4	3.9	3	4.1	3	4.4	1	4.6	1	4.1
Another Administrator	38	4	4.7	1	4.5	1	4.3	1	4.4	1	4.0	4	4.4
ESC	43	1	4.0	3	3.7	4	3.8	4	3.9	4	4.1	3	3.9
TEA	39	3	4.3	2	4.0	2	4.2	2	4.1	3	4.3	2	4.2
Private Consultant	10	5	2.2	5	2.8	5	3.1	5	3.6	5	3.0	5	2.8

Within the journal/newsletter category, 29 participants provided information pertinent to the Texas, attorney-generated newsletter, “Law Dawg”. This newsletter rated especially high in the areas of readability (*M* = 4.8) and relevance (*M* = 4.8). In all areas tested the “Law Dawg” was ranked first. With mean scores of 4.5 in the areas of cost, accessibility, readability and relevance, the journals “Educational Leadership” (*n* = 19) and “Kappan” (*n* = 16) were the next highest ranked journals. The low number of participants who indicate use of the” School Law Reporter” (*n* = 6) as a source of legal information coupled with the low ratings for each of the variables for this journal [cost (*M* = 3.7), accessibility (*M* = 3.9), readability (*M* = 3.7), relevance (*M* = 4.0), and accuracy (*M* = 4.0)] would indicate limited usefulness of this journal to Texas administrators.

Two participants wrote in the newsletter, “Texas Education News”, and rated it highly in all areas except cost.

Table 3
Mean Scores and Rankings for Journals and Newletters

	Respondents	Cost	Accessibility	Readability	Relevance	Accuracy	

Journals	Avg # of Respondents per group	Rank	Mean	Rank	Mean	Rank	Mean	Rank	Mean	Rank	Mean	Rank	Grand Mean
American School Board Journal	11	5	3.9	5	4.5	2	4.5	2	43	5	4.2	4	4.3
Law Reporter	6	6	3.7	6	3.9	6	3.7	6	4.0	6	4.0	6	3.8
Educ Ldrshp	19	2	4.5	1	4.5	2	4.5	2	4.5	2	4.5	2	4.5
Kappan	16	3	4.5	1	4.5	2	4.5	2	4.5	2	4.2	4	4.4
Educ Wk	14	4	4.4	4	4.2	5	4.3	5	4.4	4	4.3	3	4.3
Law Dawg	29	1	4.5	1	4.7	1	4.8	1	4.8	1	4.7	1	4.7

Of the sixty-eight participants in this study, 16 respondents (23.5%) reported attending professional conferences sponsored by the Texas Association of Secondary School Principals (TASSP). Respondents who attended the TASSP conference rated it highly [cost (*M* = 4.7), accessibility (*M* = 5.0), readability (*M* = 5.0), relevance (*M* = 5.0), and accuracy (*M* = 5.0)]. Few participants reported attending national conferences, but of those who did report attendance at national conferences [NASSP (*n* = 2); NAESP (*n* = 2) and ELA (*n* = 4)], the National Association of Secondary School Principals (NASSP) had the highest rating in the areas of cost (*M* = 4.7), accessibility (*M* = 5.0), readability (*M* = 5.0) and accuracy (*M* = 5.0).

Table 4
Mean Scores and Rankings for Professional Conferences

.	Respondents		Cost		Accessibility		Readability		Relevance		Accuracy		
Professional Conferences	Avg # of Respondents per group	Rank	Mean	Rank	Mean	Rank	Mean	Rank	Mean	Rank	Mean	Rank	Grand Mean
ELA	4	2	3.8	4	4.0	4	3.8	4	4.0	4	4.0	3	3.9
NASSP	2	3	4.7	1	5.0	1	5.0	1	5.0	1	5.0	1	4.9
NAESP	2	3	4.3	2	4.5	3	4.0	3	4.5	3	4.0	3	4.3
TASSP	16	1	4.7	1	4.7	2	4.9	2	4.8	2	4.9	2	4.8

Forty percent of the respondents (*n* = 27) report obtaining legal information through their membership in the Texas Association of Secondary School Principals. With the exception of the ASCD (*n* = 25) and NASSP (*n* = 14) participants obtained less legal information from national organizations than from state organizations. Less than 6% of the participants report obtaining legal information from the national organizations Education Law Association and the National Association of Secondary Principals.

TASSP ranked highest in each of the five areas tested and had the highest grand mean score (*M* = 4.6) in the category of Professional Organizations. The professional organizations ELA (*M* = 3.9) and AASA (*M* = 3.9) received the lowest ratings in this section.

This study also gathered data on four professional conferences. Of the conferences listed in this study, TASSP had the highest number of attendees (*n* = 14) and the national associations for school principals (NASSP and NAESP) reported the lowest number of attendees (*n* = 2). The NASSP was the highest rated conference (*M* = 4.9). TASSP was the second highest rated conference. (The disparity in the number of reported attendees may be skewing the results of this section.)

Table 5
Mean Scores for Professional Organizations

	Respondents		Cost		Accessibility		Readability		Relevance		Accuracy		
	Avg # of Respondents per group	Rank	Mean	Rank	Mean	Rank	Mean	Rank	Mean	Rank	Mean	Rank	Grand Mean
ELA	4	8	3.8	6	4.0	8	3.8	9	4.0	9	4.0	8	3.9
NASSP	14	3	4.0	4	4.5	3	4.4	3	4.3	6	4.4	2	4.3
NAESP	8	7	3.4	9	4.4	5	4.3	5	4.4	3	4.4	2	4.2
AASA	4	8	3.5	8	4.0	8	4.0	8	4.0	8	4.0	8	3.9
ASCD	25	2	4.1	3	4.5	3	4.5	2	4.3	3	4.3	6	4.4
TASSP	27	1	4.5	1	4.7	1	4.7	1	4.7	1	4.7	1	4.6
TASA	14	3	4.0	4	4.3	6	4.3	5	4.3	3	4.1	7	4.2
TASB	14	3	3.8	6	4.2	7	4.1	7	4.2	7	4.4	2	4.1
TEPSA	14	3	4.4	2	4.6	2	4.4	3	4.5	2	4.4	2	4.5

Participants were asked to self-report their knowledge of law within 14 specific areas of school law. Respondents self-reported student discipline (*M* = 4.3) as the area of school law where they had the best command of legal knowledge. Sexual harassment (*M* = 3.7), personnel (*M* = 3.7), and child abuse (*M* = 3.7) were the second highest rated categories of knowledge. Tort was the area of legal knowledge with the lowest mean (*M* = 2.5). School finance, immunization, records and defamation (*M* = 2.7) were also areas of low levels of self-reported knowledge.

Table 6
Mean Scores and Ranking for Knowledge of Specific Areas of Public School Law

Content Area	# Respondents	Mean	Ranking
Student Discipline	65	4.3	1
Sexual Harassment	65	3.7	2
Personnel	65	3.7	2
Child Abuse	65	3.7	2
Special Education	65	3.6	5
Religion	65	3.5	6
Special Programs	64	3.5	6
Discrimination	65	3.3	8
Contracts	65	3.2	9
Transportation	64	2.9	10
Finance	65	2.7	11
Immunization/Records	65	2.7	11
Defamation	65	2.7	11
Tort	65	2.5	14

Disagregation by Independent Variable

An analysis of legal resource categories when disaggregated by the independent variables of gender, job, certification/degrees, years experience and number of law classes taken at the university level provided the following points of interest.

Certification: Sixty-six persons who completed this portion of the survey were divided into groups based on degrees and certifications held. No respondents reported holding a J.D., seven persons held an Ed.D. or a Ph.D., 35 were principals and 17 were superintendents. No discernable patterns were detected within the 32 subscales when analyzed by certification.

In the self-report law knowledge section, persons with Ed.D.s and Ph.D.s rated themselves slight higher in most every subscale.

Experience: For this independent variable, cells of respondents were grouped based on quartiles. The first quartile grouping (25.4%) contained those persons with 0-6 years of experience. The second grouping (24.9%) was composed of persons with 7-8 years experience. The third group (24%) was comprised of persons with 9-14 years experience and the fourth group (26.9%) contained persons with 15 or more years of experience.

The length of experience was related to an increase in mean scores for four of the subscales, the NASSP website (*M* = 4.0: *M* = 3.7: *M* = 5.0), the attorney generated newsletter "Law Dawg" (*M* = 3.9: *M* = 4.4: *M* = 4.9), the journal Education Week (M = 3.6: *M* = 4.6: *M* = 4.3: *M* = 5.0), and the professional organization NAESP. Within three of the subscales, mean scores were high in the first and fourth groups and significantly (at least one mean point) lower for groups two and three [the electronic website for AASA (*M* = 5.0: *M* = 4.5: *M* = 3.2 *M* = 5.0), the professional journal American School Board Journal (*M* = 5.0: *M* = 3.7: *M* = 3.6: *M* = 4.5), and professional organization AASA (M = 4.6: *M* = 3.0: *M* = 3.0: *M* = 5.0).

For the independent variable years of experience, differences in self-report law knowledge section were negligible.

Gender: Of the 68 participants who marked the gender portion of the survey, 54.4% were male and 35.3% were female. Within the gender variable, females rated resource materials higher than their male counterparts on 27 of the 32 subscales. The variables where the means, as computed based on gender, had the greatest range were West Law (male, *M* = 4.0: female, *M* = 1.8), Lexis-Nexis (male, *M* = 4.0: female, *M* = 5.0), American School Board Journal (male, *M* = 3.9: female, *M* = 5.0), the National Association for Elementary School Principals (male, *M* = 3.5: female, *M* = 4.8), and the Education Law Association (male, *M* = 3.4: female *M* = 4.5).

On the self-report section of law knowledge, females had higher means in ten of the fourteen sub scales. The means in this section, however, had little variability and in only one subscale was there a one mean point difference. (child abuse, males, *M* = 3.3: females *M* = 4.3).

Job Description: Of the sixty-eight persons who responded to this section of the survey, six held the position of superintendent, assistant superintendent, or other administrative duties. Thirty-nine respondents were secondary principals and 23 respondents were elementary principals. In 17 of the subscales elementary principals rated electronic resources, human resources, journals, professional organizations and professional conferences lower than the superintendents. Areas of major mean difference were private consulting (superintendents, *M* = 4.2: secondary principals *M* = 2.5), Texas Education Association (superintendents, *M* = 4.9: secondary principals, *M* = 3.9), School Law Reporter (superintendents, *M* = 5.0: secondary principals, *M* = 3.4), Education Week (superintendents, *M* = 3.5: elementary principals, *M* = 4.5), and Texas Association of School Boards (superintendents, *M* = 4.8: elementary principals, *M* = 3.5).

On the self-report section of the survey, superintendents rated their knowledge level higher than did the principals in nine of the fourteen subscales. The areas of law with the largest differences were personnel (superintendents, *M* = 4.7: elementary and secondary principals, *M* = 3.7), finance (superintendents, *M* = 3.8, elementary principals, *M* = 2.6), and discrimination (superintendents, *M* = 4.0: elementary principals, *M* = 3.1). There were no major differences between the means for the knowledge subscales for elementary principals and secondary principals.

Knowledge (self-reported): For this study participants were asked to rate their overall knowledge of school law on a scale from 1-10 (10 was highest ranking). Two participants gave themselves a rating of three, four participants rated themselves at four, thirteen persons rated themselves at five, 11 respondents rated themselves at 6, 19 respondents rated themselves at seven, 12 respondents rated themselves at eight, six participants rated at nine, and one participant rated him or herself as having a knowledge level of school law of 10.

In five of the 32 subscales, the level of school law knowledge each participant assigned to himself or herself as an independent variable had an inverse relationship to mean scores for ASCD, AASA, private consultant, American School Board Journal, The School Law Reporter, and the Kappan . In other words, the lower a person rated his/her knowledge of school law the higher the participant rated the resource.

The overall rating of legal knowledge (independent variable) was consistent with participant ratings on the 13 subscale measurements of specific areas of school law knowledge (i.e., the lower a participant rated himself on the independent variable the lower the self help score in the subscales).

Law Classes Taken at the University Level: Of the 68 respondents, five reported having taken no law classes, 32 have taken one law class, 17 have taken two classes, and three persons report having taken 4 or more law classes. In all fourteen of the subscales on specific areas of law, knowledge was the highest after 3 law classes. There was a trend for reported knowledge to increase with each subsequent law class. For example, in the subscale knowledge of contracts the means increased from $M = 2.0$ to $M = 2.9$ to $M = 3.6$ to $M = 4.2$. However, persons who reported taking 4 or more law courses have lower means than those persons with none, one, two or three classes.

Within the category of electronic responses there was a tendency to rate the subscales higher as the number of law classes increased. There was relatively little variation in the way the number of law classes affected the human resources. However, persons reporting no law classes, three law classes or four or more law classes did rate private consultants higher those who had taken 2 and/or 3 law classes (no class, M = 4.0: one class, $M = 2.3$: two classes $M = 2.8$: three classes, $M = 4.2$, four or more classes, $M = 4.3$).

Conclusion

Within the electronic resources category, West Law was the least accessed and the lowest rated resource. While the Texas Education Association was the most accessed website, the websites for the Texas Association of School Boards and the website for the Texas Association of School Administrators received the highest overall ratings. Analysis of Professional Organizations showed that participants rated the Texas-based professional organizations, TASSP and TEPSA, as the best sources for legal information. Continuing their preference for Texas-based information, participants also rated the Texas generated "Law Dawg" as the highest rated journal/newsletter resource.

Analysis of the human resource portion of the study indicated that participants rated "ask another administrator" as the highest human resource. Paradoxically, participants rated "ask another administrator" fourth (out of a possible five resources) in the area of accuracy. Researchers are drawn to the assumption that although respondents know the information they obtain from other administrators is likely to be incorrect, they are not deterred from using other administrators as the number one way to acquire legal information.

The range of means computed in the self-reported legal knowledge portion of the survey vary from a high of $M = 4.3$ (student discipline) to $M = 2.5$ (tort). During analysis, researchers questioned whether the low mean scores for legal areas that might be more directly a function of the superintendency [i.e., contracts ($M = 3.2$), transportation ($M = 2.9$), and finance ($M = 2.7$)] were affected by the disparity in the number of superintendents ($n = 6$) and principals ($n = 62$) who responded to the survey. However, as these means are weighted, the assumption is not valid and there appears to be no reasoning other than the participants truly believe they lack legal understanding in these areas.

The focus of this study was to determine the resources educational professionals use to stay current with the ever-changing field of public school law. And, that we did. The results of this study, however, raise additional questions. For example, if districts know that administrators are turning to each other for legal information, it seems prudent for districts to make a concerted effort to increase the legal knowledge base of administrators. Also, there is a need to know how districts are "using" attorney, for example, are districts using the attorneys in a proactive manner to train and update the educational professionals, or are the attorneys "brought in" to defend the district? These two questions will form the basis of a qualitative study whose purpose will be to examine whether districts are making the best use of their legal dollars.

References

Armenta, T. (1999). Using the internet to stay current in school law. NASSP Bulletin, 83, 21-25.

August, B. P. (1984). Knowledge among educators, parents and students of educational law that governs California public secondary schools. [OCLC First Search]. (Doctoral dissertation, University of Southern California). Dissertation Abstracts International, 45, (08A), 2315.

Bagnato, M. A. (1990). Disciplinary exclusion: Administrators' knowledge and application of the law governing suspension/expulsion of handicapped students. [OCLC First Search]. (Doctoral dissertation, State University of New York at Albany). Dissertation Abstracts International, 51, (07A), 2205.

Barr, J. M. (1984). The relationship between an administrator's attitude toward the law and the administrator's knowledge of certain landmark legal cases. [OCLC First Search]. (Doctoral dissertation, University of Toledo). Dissertation Abstracts International, 45, (12A), 3488.

Boyle, J. R. & Weishaar, M. (2001). Special education law with cases. Needham Heights, MA: Allyn & Bacon.

Bravenec, D. L. (1998). A critical needs survey of Texas elementary and secondary school principals regarding administrator preparation and administration of special education programs. [OCLC First Search]. (Doctoral dissertation, Texas A&M University – Kingsville). Dissertation Abstracts International, 59, (04A), 1120.

Carmon, L. (1982). The knowledge and perception of public school administrators in Michigan towards four selected United States court cases. {OCLC First Search]. (Doctoral dissertation, University of Michigan). Dissertation Abstracts International, 43, (06A), 1759.

Chapman, D. W. (1986). Public school administrators' knowledge of recent Supreme Court decisions affecting school practice. (ERIC Document 295 331).

Crockett, C. W. (1994). A survey of Alabama principals' perceived comfort levels regarding their legal knowledge of students' rights in the areas of constitutional law, torts, and special education. [OCLC First Search]. (Doctoral dissertation, University of Alabama). Dissertation Abstracts International, 56, (03A), 0772.

Daley, E. K., Jr. (1994). An assessment of the knowledge of tort liability law, in the areas of duty and standard of care, by selected teachers and principals, in the specific areas of sexual misconduct between professional school employees and students. [OCLC First Search]. (Doctoral dissertation, George Mason University). Dissertation Abstracts International, 55, (01A), 4633.

Davidson, D. N. (1999). Perceptions and knowledge of special education law among principal fellows in North Carolina. [OCLC First Search]. (Doctoral dissertation, University of North Carolina at Charlotte). Dissertation Abstracts International, 60, (06A), 1843.

Gascue, J. D. (1982). An assessment of Nevada's secondary school administrators' level of knowledge regarding procedural due process for students. [OCLC First Search]. (Doctoral dissertation, University of San Francisco). Dissertation Abstracts International, 43, (07A), 2179.

Goss v Lopez, 419 U.S. 565, 95 S.Ct. 729.

Hardin, D. T. (1998). What do superintendents think about principalship preparation curriculum? (ERIC Document 426 471). Paper presented at the Annual Meeting of the Southwest Educational Research Association, Houston, TX.

Hillman, S. J. (1988). School administrators' legal knowledge: Information sources and perceived needs. (ERIC Document 301 975). Paper presented at the Annual Meeting of the American Educational Research Association, New Orleans.

Johnson, J. M. (1985). Educators' knowledge of legal issues affecting students: Considerations for teacher education. [OCLC First Search]. (Doctoral dissertation, University of Michigan). Dissertation Abstracts International, 46, (11A), 3236.

Jolly, R. A. (1995). The effectiveness of secondary educational administration preparation programs at Kansas Regents universities. [OCLC First Search]. (Doctoral dissertation, University of Kansas). Dissertation Abstracts International, 56, (11A), 4224.

Kalafatis, N. E. (1999). Principals' knowledge of legal issues related to search and seizure issues in Virginia. [OCLC First Search]. (Doctoral dissertation, College of William and Mary). Dissertation Abstracts International, 60, (06A), 1849.

Karam, G. M. (1993). Two hundred years later: A comparison of school officials' and students' knowledge of and attitudes regarding the United States Bill of Rights in selected Iowa school districts. [OCLC First Search]. (Doctoral dissertation, University of Iowa). Dissertation Abstracts International, 54, (07A), 2408.

Kemerer, F. & Walsh, J. (2000). The educator's guide to Texas school law. 5th Edition. Austin: The University of Texas Press.

Kerrigan, J. (1987). A study of the perceptions of school administrators regarding educational law, legal policies and procedures. [OCLC First Search]. (Doctoral dissertation, University of Massachusetts). Dissertation Abstracts International, 48, (09A), 2208.

Kuck, C. L. (1992). A study of public and parochial teachers' knowledge, attitudes, and practices relating to student rights. [OCLC First Search]. (Doctoral dissertation, University of Illinois at Chicago). Dissertation Abstracts International, 53, (12A), 4453.

Lattimore, L. (2001). Educating the administrators. Quill, 89, 12-14.

Lester, P. E. (1993). Preparing administrators for the twenty-first century. (ERIC Document 364 945). Paper presented at the Annual Meeting of the New England Educational Research Organization Portsmouth, NH).

Millerborg, A. & Hyle, A. E. (1991). Ethics or the law: What drives administrative decisions? (ERIC Document 335 768).

Moore, S. J. (1997). An assessment of selected knowledge of school law from public educators in the state of Tennessee. [OCLC First Search]. (Doctoral dissertation, Tennessee State University). Dissertation Abstracts International, 58, (08A), 2939.

Nardone, A. J., Jr. (1999). The campus administrator as instructional leader in acquisition of knowledge of special education legal issues. [OCLC First Search]. (Doctoral dissertation, University of New Mexico). Dissertation Abstracts International, 60, (04A), 0963.

Pauken, P. D. (1997). Knowledge and practice of Ohio's school administrators regarding student-on-student violence and associated legal liability. [OCLC First Search]. (Doctoral dissertation, Ohio State University). Dissertation Abstracts International, 58, (10A), 3792.

Paul, G. N., III. (2001). An analysis of Georgia public school teachers' knowledge of school law: Implications for administrators. {OCLC First Search]. (Doctoral dissertation, Georgia Southern University). Dissertation Abstracts International, 62, (10A), 3260.

Petzko, V. N. (1998). Preventing legal headaches through staff development: Considerations and recommendations. NASSP Bulletin, 82, 35-42.

Risinger, C. L. (1989). Texas public school principals and corporal punishment. The relationship between their legal awareness of it and their attitude towards its use. [OCLC First Search]. (Doctoral dissertation, University of North Texas). Dissertation Abstracts International, 51, (01A), 0046.

Reutter, E. E., Jr. (1994). The law of public education. 4th Edition. Westbury, NY: The Foundation Press, Inc.

Robertson, L. R. (1996). Public school administrators' knowledge of special education law. [OCLC First Search]. (Doctoral dissertation, Florida International University). Dissertation Abstracts International, 57, (04A), 1563.

Russell, R. F. (1990). Opinions toward and knowledge of special education law: A survey of special education administrators. [OCLC First Search]. (Doctoral dissertation, Univsity of Toledo). Dissertation Abstracts International, 51, (12A), 3984.

Sacken, D. M. (1987). Multiple dimensions of school law courses. (ERIC Document 289 238). Paper presented at the Annual Meeting of the University Council for Educational Administration, Charlottesvile, VA).

Schmidt, D. M. (1987). Illinois school administrators' knowledge of special education laws and regulations. [OCLC First Search]. (Doctoral dissertation, Northern Illinois University). Dissertation Abstracts International, 48, (07A), 1614.

Shoop, R. J. & Dunklee, D. R. (1992). School law for the principal: A handbook for practitioners. Boston: Allyn and Bacon.

Souve, B. A. (1986). Field testing of an instrument for measuring educator knowledge of laws of the state of Michigan. [OCLC First Search]. (Doctoral dissertation, Western Michigan University). Dissertation Abstracts International, 47, (08A), 3014.

Sperry, D. J. (1999). Working in a legal and regulatory environment: A handbook for school leaders. Larchmont, NY: Eye on Education.

Steele, D. J. (1990). Educators' knowledge of the constitutional rights of secondary school students. [OCLC First Search]. (Doctoral dissertation, University of South Florida). Dissertation Abstracts International, 51, (11A), 3593.

SUPERINTENDENT CONTRACTS: PAY FOR PERFORMANCE?

Leslie Robert Stellman, Esq.
The Johns Hopkins University

- I Superintendent Contracts: Their Basic Terms
  - A. Duration and Termination
    - 1. "Kick-Out Clauses" versus Termination for Cause
    - 2. Defining "For Cause"
      - a. Bases for Termination of Superintendents
      - b. Statutory and Other Legal Impediments to Termination
      - c. Due Process and Procedural Considerations
  - B. State and Local Laws Impacting Superintendents' Rights
- II. Performance-Based Criteria:
  - A. Compensation -- "Pay for Performance"
  - B. Deferred Compensation – Looking at the Long Term
  - C. Linking Pay to Test Scores, Student Achievement, and Other Criteria
    - 1. Lawful, Non-Arbitrary Criteria
    - 2. Objective versus Subjective Criteria
    - 3. Appeals and Dispute Resolution
- III. No Child Left Behind Act
  - A. Applying the NCLBA to Superintendent Performance
  - B. Evaluating Superintendent's Performance, Using NCLBA Goals as Benchmarks
- IV. Self-Appraisals and Other Tools to Lawfully Judge Performance

Beauty Meets the Beast:
The Role of Dress and Appearance Standards in Gender Discrimination Cases

Karen L. Michaelis, Ph.D. J.D.
Attorney
Adjunct Associate Professor
University of Wisconsin-Madison

Education Law Association
48th Annual Conference
November 14-16, 2002
New Orleans, LA

Beauty Meets the Beast:
The Role of Dress and Appearance Standards
in Gender Discrimination Cases

I. Setting the stage
  Some illustrations

II. Naomi Wolf finds a new label
  Professional Beauty Qualification as BFOQ

III. Potential legal theories and their drawbacks

Current Theories of Discrimination Based on Sex Under Title VII

A. Community Norms

1. ***Diaz v. Pan American World Airways***, 442 F.2d 385 (1971).

The question the court considered was whether being female is a BFOQ for a job as a flight attendant "that is reasonably necessary to the normal operation of Pan Am's business" at 386.

Court adopted the EEOC guidelines "which state that 'the Commission believes that the bona fide occupational qualification as to sex should be interpreted narrowly." 442 F.2d ,at 387, quoting EEOC Guidelines, 29 C.F,R, 1604.1 (a).

The court held: "…because the non-mechanical aspects of the job of flight cabin attendant are not 'reasonably necessary to the normal operation of Pan Am's business,' Pan Am cannot exclude **all** males simply because **most** males may not perform adequately." at 388.

The exclusion of all men as flight cabin attendants was based on 'the ability to perform non-mechanical functions which we find to be tangential to what is 'reasonably necessary' for the business involved, the exclusion of **all** males because this is the **best** way to select the kind of personnel Pan Am desires…" at 388.

Pan Am's passengers preferred female stewardesses, but the court held that customer's preferences should not be allowed to undermine Title VII's purpose which is to overcome illegitimate sex discrimination.

Essence of business rule from BFOQ test:

> "Discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively." *Diaz*, 442 f.2d at 388.

See also: *Gunther v. Iowa State Men's Reformatory,* 612 F.2d 1079, 1085 (8th Cir.) cert. denied 446 U. S. 966 (1980); *Arritt v. Grisell*, 567 F.2d 1267, 1271 (4th Cir. 1977); *Manhart v. Los Angeles Department of Water and Power*, 553 F.2d 581, 587 (9th Cir. 1976), vacated on other grounds, 435 U. S. 701, 98 S. Ct. 1370 (1978); *Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 862 (7th Cir. 1974) cert. denied sub nom. 419 U. S. 1122, 95 S. Ct. 805 (1975); *Dothard v. Rawlinson* 433 U. S. 321, 97 S. Ct. 2720 (1977).

2. ***Tamini v. Howard Johnson Co. Inc.,*** 807 F.2d 1550 (11th Cir. 1987).

Tamini was fired for failing to wear makeup to improve her appearance when her face broke out as a result of her pregnancy.

Tamini established that she "was dismissed for failing to comply with the rule implemented by the manager of the motor lodge that all female employees wear makeup. After plaintiff had proved her prima facie case, defendant failed to show a legitimate, nondiscriminatory reason for Plaintiff's rejection." At 1554, citing *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, at 253 (1981).

Defendant has not demonstrated that requiring that female employees wear makeup is necessary to maintain the defendant's public image, which would have established a 'bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.'" At 1554, quoting 42 U.S.C. sec. 2000-2(e).

The makeup requirement had not been a general policy of the defendant prior to plaintiff's pregnancy and resulting deteriorating appearance. The court concluded "that the mandatory makeup rule was conceived, implemented and applied to plaintiff in a discriminatory manner because of plaintiff's pregnancy, and further finds that, in dismissing plaintiff from her job, defendant discriminated against plaintiff on the basis of her sex." At 1554.

B. Disparate Treatment

1. ***Fadhl v. City and County of San Francisco***, 741 F.2d 1163 (9th Cir. 1984).

Female probationary police officer, terminated in the 9th week of a 14 week Field Training Program purportedly because of unacceptable performance sued the SFPD for sex discrimination.

Evidence indicated that Fadhl was given lower numerical scores than men whose performance was similar to or worse than her performance. Additionally, her scores did not always correspond to the written scoring guidelines. (at 1165).

Sexual stereotyping of a woman's physical abilities, resulting in a refusal to hire her, is the type "of invidious discrimination that violates Title VII." (at 1165).
See also: *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983).

"Where employment discrimination affects the applicant's score or the evaluative process, it suffices to impose initial liability to find that sex was a significant factor in that decision not to process an application further or in the decision to terminate an employee. **See:** *Texas Dept. of Community Affairs v. Burdine*, 450 U. S. 248, 256 (1981). ("plaintiff may succeed 'by persuading the court that a discriminatory reason more likely motivated the employer") at 1166.

2. ***Andre v. Bendix Corp.***, 841 F.2d 172 (7th Cir. 1988).

Andre was dismissed for wearing a tank top that her supervisor believed to be "inappropriate for a supervisor and in violation of Bendix's dress code. The dress code, however, did not address what type of shirts an employee was permitted to wear; it discussed only pants and shoes." at 174.

Andre's claimed discriminatory treatment under Title VII resulted from her allegedly improper discharge. The ultimate factual in quiry in this type of Title VII case is whether or not the employer treated some employees less favorably than others because of impermissible factors." at 175, citing *United Postal Service Board of Governors v. Aikens*, 460 U. S. 711, 715 (1983).

"The Supreme Court set forth the allocation of burdens of proof for a Title VII discriminatory treatment case in *McDonnel Douglas Corp. v. Green*, 411 U. S. 792 (1973). The plaintiff has the initial burden of proving a prima facie case of discrimination by a preponderance of the evidence. A plaintiff alleging a discriminatory firing need show only that [s/he] was fired from a job for which [s/he] was qualified while others not in the protected class were treated more favorably." *Bellissimo v. Westinghouse Electric Corp*, 764 F.2d 175, 179 (3d Cir. 1985), cert. Denied, 475 U. S. 1035 (1986). To meet her burden of establishing a prima facie case of discriminatory discharge, Andre must therefore show both that she was qualified for and satisfactorily performed the duties of her job." *Lee v. National Can Corp.*, 699 F.2d 932, 936 (7th Cir.), cert. Denied 464 U. S. 845 (1983)."

"If the plaintiff established a prima facie case, an inference of discrimination is raised; we assume that the employer's actions, if unexplained, were more likely than not the result of impermissible factors, citation omitted. Once the plaintiff proves a prima facie case, the burden shifts to the defendant to demonstrate a legitimate, nondiscriminatory reason for its actions. If the defendant meets this burden, the plaintiff must prove by a preponderance of the evidence that the defendant's asserted reason for its actions is in fact pretext. The plaintiff can meet this burden by demonstrating either that the employer's explanation I unworthy of credence or that it is more likely that a discriminatory reason actually accounted for the employer's actions. Citations omitted. The plaintiff, however, always retains the ultimate burden of persuading the finder of fact that the defendant intentionally discriminated against him or her. At 175, citing I, 450 U.S. at 253.

The court held that Andre had failed to prove "that a male employee involved in similar incidents would have been treated differently than Andre." At 176.

"… although Andre had established a prima facie case, she did not present enough evidence to corroborate her claim that her sex was the real reason for her discharge." at 176.

C. Disparate Impact Theory

1. ***Wislocki-Goin v. Mears***, 831 F.2d 1374 (7th Cir. 1987).
Concerns professional image through dress.

Plaintiff was hired at a Juvenile Center. Employees were required to "maintain[ ] a professional image." (p,1376). The dress standard was "the Brooks Brothers look."

Wislocki-Goin was reprimanded for wearing excessive makeup and for wearing her hair down. There were two other incidents Judge Mears found unprofessional, inappropriate or offensive. Wislocki-Goin had cried in front of a disturbed juvenile at a disposition hearing, and she wrote a Dear Santa letter that the judge found offensive.

Wislocki-Goin failed to establish a prima facie case of disparate treatment "because she did not prove that a similarly situated male employee was given the benefit of more lenient treatment." (p. 1378).

D. BFOQ v Business Necessity

1. ***Wilson v. Southwest Airlines Company,*** 517 F. Supp. 292 (N. D. Texas 1981).

Southwest airlines refused to hire males as flight attendants or ticket agents. The airline argued that their business success was predicated on the all-female staff hired to promote the airline's "love image" *Wilson*, at 296, and to satisfy Southwest's customer's preference for female flight attendants and ticket agents.

The court held that Section 703(e) of Title VII qualifies the otherwise broad scope of Title VII by providing a BFOQ exception which states:

> (e) Notwithstanding any other provision of this subchapter,
>
> (1) It shall not be an unlawful employment practice to hire [an employee] … on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.

Customer preference to determine BFOQ applicability:

> The Interpretive Memorandum of Title VII, 110 Cong. Rec. 7212 (1964) has been viewed as a source of legislative intent. The Memorandum states that the BFOQ is "a 'limited exception' to the Act's prohibition against discrimination conferring upon employers a 'limited right to discriminate on the basis of religion, sex, or national origin where the reason for the discrimination is a bona fide occupational qualification." *Wilson*, 517 F. Supp. 292 (1981), quoting Interpretive Memorandum of Title VII, 110 Cong. Rec. 7212, at 7213 (1964).
>
> But the *EEOC Guidelines on Discrimination Because of Sex*, 29 C.F.R. sec. 1604.2 (a) (1965) explained that the "BFOQ exception did not justify 'the refusal to hire an individual because of the preferences of … the employer, clients or customers,' except where necessary for authenticity as provided in sec. 1604.2(a)(2)." *Wilson*, at 298.

The BFOQ defense applies to both intentional and unintentional discrimination.

BFOQ differs from the **doctrine of business necessity**. Business necessity is available only in cases involving **unintentional** discrimination, "when job criteria which are 'fair in form, bust discriminatory in operation' are shown to be 'related to' job performance." *Wilson,* at 297. See *Swint v. Pullman-Standard*, 624 F.2d 525, 534 (5th Cir. 1980) cert. granted in part – U. S. --, 101 S. Ct. 1972 (1981)

IV. Alternative approaches within the confines of existing sex discrimination theories Katharine T. Bartlett's use of community standards.

Bartlett argues that it is futile to try to eliminate the court's reliance on community standards in determining what Title VII requires because "equality, not less than other legal concepts, cannot transcend the norms of the community that has produce it." Katharine T. Bartlett, *Only Girls Wear Barrettes: Dress and Appearance Standards, Community Norms and Workplace Equality*. 92 Mich. L. Rev. 2541, at 2545 (1994).

The problem, according to Bartlett, is that courts have viewed community norms as "objective, external criteria that tend to legitimate most restriction" at 2545.

For Bartlett, the more appropriate approach would be to ask whether community norms, as applied to workplace rules and practices, tend to disadvantage women at 2545.

Robert Post, in *Prejudicial Appearances: The Logic of American Anti-discrimination Law*. 88 Calif. L. Rev. 1 (2000) states that courts continually fail to ask the correct question in sex discrimination cases. He suggests that Justice Brennan posed the appropriate question in *United States v. Weber*, 443 U. S. 193 (1979) by relying on a sociological approach where "anti-discrimination law must be seen as transforming preexisting social practices, such as race or gender, by reconstructing the social identities of persons. Brennan sought to break free from the usual reliance on stereotypes in Title VII cases. Instead, Brennan advocated a different focus in sex discrimination cases where courts would address the question, what does the law intend to achieve? In sex discrimination cases, the court would focus on existing social practices that tend to obscure the prejudicial effect those practices have on individuals based on gender.

In other words, Brennan's approach would have the court focus on the social context in which the prejudicial judgments of the community disadvantage particular individuals on the basis of their appearance for the purpose of transforming existing legal practices regarding stereotypic notions of sex. In that way, Post argues, sex discrimination decisions will provide accountability, doctrinal integrity, purposive clarity and a logic currently unattainable because of the court's continued reliance on the dominant conception of discrimination based on sex under Title VII.

V. What Needs to Be Done?

Creating a lexicon of discrimination based on sex
Rooting out blind spots: judges' language in sex discrimination decisions

HUMPTY DUMPTY JURISPRUDENCE: DEFINITIONAL CONFUSIONS AND LEGAL CONUNDRUMS in SEX, GENDER AND SEXUAL ORIENTATION DISCRIMINATION LAW

SUSAN J. SCOLLAY, PH.D.
Associate Professor
College of Education
111 Dickey Hall
University of Kentucky
Lexington, KY 40506-0017

859.257.7834 (phone)
859.257.1015 (fax)
scollay@uky.edu

AND

CAROLYN S. BRATT, J.D.
W.L. Matthews Professor of Law
College of Law
Law Building
University of Kentucky
Lexington, KY 40506-0048

859.257.3685 (phone)
859.323.1061 (fax)
cbratt@uky.edu

A Presentation at
Balancing Rights: Education Law in a Brave New World
The Education Law Association
48th Annual Conference

New Orleans, Louisiana

November 2002

PRESENTATION OUTLINE

Introduction

In a colloquy in Lewis Carroll's Through The Looking Glass, Humpty Dumpty tells Alice that, "When I use a word, it means what I choose it to mean, neither more nor less." We smile at the absurdity of a world in which words have no fixed meanings. We intuitively understand that if speakers and writers are at liberty to assign their own idiosyncratic definitions to words and change those definitions at will, meaningful thought and communication are impossible. Yet, all too often, Humpty Dumpty seems to have authored court decisions defining the legal rights of sexual minorities. When courts fail to use terms such as sex, gender, sexual orientation, gender identity, transgender, transsexual and transvestite precisely and consistently, confusing, conflicting and/or incorrect decisions are rendered.

This presentation explores current definitional confusions and offers a set of definitions that distinguishes among these various terms and the concepts to which they refer. It also highlights a representative sample of court decisions that either erroneously or correctly employed these terms when analyzing the legal issues in the case. Obviously, the consistent use of correct definitional terms can aid in a coherent and equitable resolution of legal controversies involving sexual minorities. Potentially more important to those involved with schools, educators, and school children, however, consistent use and understanding of these terms can facilitate the creation of school district and building policies that are fair to and protect the rights of lesbian, gay, bisexual, transgender and questioning students and employees who do not ascribe to currently dominant societal norms and expectations in dress, demeanor, and/or private behavior.

I. DEFINITIONAL EXERCISE

To illustrate how confused current understandings are of pertinent terms and concepts, we ask that session participants --and outline readers-- complete the matching exercise on the following page. Section A contains a variety of terms that commonly appear in discussions and court decisions concerning claims of sex, gender and sexual orientation discrimination. Brief definitions of the same terms are listed in Section B. The task is to find the appropriate definition in Section B for each term listed in Section A. Space is provided to write the appropriate term number/s next to its correct definition. Please note that some of the terms may be synonyms so there are fewer different definitions than there are terms listed.

SECTION A

1. Female
2. Transsexual / Intersexual
3. Heterosexual
4. Sex
5. Masculine
6. Gay
7. Sexual Orientation
8. Bi-sexual
9. Woman
10. Gender
11. Man
12. Lesbian
13. Homosexual
14. Gender Identity
15. Male
16. Feminine
17. Transgender
18. Sexual Identity
19. Gender Expression
20. Sex Role

SECTION B

______ A. The sex to which one is physically attracted.

______ B. The socio-cultural meanings assigned to being female or male.

______ C. The sex with which one self identifies.

______ D. XX chromosomes; ovaries & uterus; vagina & clitoris; estrogens

______ E. Both-sex physical attraction.

______ F. Same-sex physical attraction.

______ G. Basic distinctions made on the basis of chromosomal genetics, reproductive glands, genitalia, or hormones.

______ H. A man who is physically attracted to men.

______ I. XY chromosomes; testes & prostrate; penis & scrotum; androgens

______ J. The gender with which one self-identifies and/or expresses through dress, demeanor, etc.

______ K. Different-sex physical attraction.

______ L. Characteristics included in the dominant socio-cultural meanings assigned to being female.

______ M. A lack of congruence between genitalia and chromosomes by birth or medical procedure.

______ N. A woman who is physically attracted to women.

______ O. Lack of congruence between one's dress/demeanor/behavior and the dominant, socio-cultural definition of *feminine* or *masculine*.

______ P. Characteristics included in the dominant socio-cultural meanings assigned to being male.

II. Relevant Cases

1. Sex Discrimination Cases

a. Oncale v.Sundowner Offshore Service, Inc., 523 U.S. 998 (1998)(Same-sex sexual harassment is actionable under Title VII. The sex of the harasser is irrelevant to a claim of impermissible sexual harassment as long as the employee was the object because of her/his sex. Expressly recognized that male-on-male sexual harassment in the workplace was not the evil Congress was concerned with when it enacted Title VII. However, it found that statutory prohibitions often go beyond the principal evil to cover "reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed."

b. Mississippi University for Women v. Hogan, 458 U.S. 718 (1982)(State sponsored educational institution could not discriminate in its treatment of males and females unless the sex-based discrimination is substantially related to an important governmental objectective.)

c. Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996)(Followed – *Hogan*. Public school must provide male and female students with equivalent levels of protection from battery and harassment absent an important governmental objective.) In accord, Montgomery v. Independent School District No. 709, 109 F.Supp.2d 1081 (D.Minn. 2000).

d. Oiler v Winn-Dixie, 2000 WL 31098541 (E.D. La., September 16, 2002)(A male employee who was fired for cross-dressing off the job did not state a claim of sex discrimination under Title VII by establishing that women employees were not terminated for wearing clothes associated with men (jeans, plaid shirts and work boots) on the job.

2. Gender Discrimination Cases

a. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)(The denial of a promotion to a woman because she did not conform to the partners stereotypes of appropriate female behavior was actionable under Title VII.).

b. Los Angeles Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978)(Female workers successfully challenged an employer policy that required all women workers to make larger contributions to its pension fund than its male employees for equal retirement benefits. Title VII forbids the "entire spectrum of disparate treatment of men and women resulting from sex stereotypes.).

c. Nichols v. Azteca Restaurant Enterprises, Inc., 256 F.3d 864 (9th Cir. 2001)(Followed Price Waterhouse. Title VII prohibits harassment of a male employee because he was effeminate.)

d. Rosa v. Park West Bank, 214 F3d 213 (1st Cir. 2000) (A claim of sex discrimination may be sustained when cross-dressing man was denied a loan application until he went home to change clothes).

e. Oiler v Winn-Dixie, 2000 WL 31098541 (E.D. La., September 16, 2002)(Discharging an employee because he is a cross-dresser is not actionable because Title VII does not discrimination based on gender expression.)

f. Brd. of Trustees of Bastrop Independent School District v. Toungate, 958 S.W.2d 365 (Texas 1997)(Permitted the imposition of grooming codes that are different based on the student's sex.)

g. Doe ex rel. Doe v. Yunits, 2000 WL 33162199 (Mass.Super. 2000). (School district was enjoined from forbidding a male student to wear clothing and accessories associated with that worn by female students.)

3. Transsexual Discrimination Cases

a. Ulane v. Eastern Airlines, Inc., 742 F.2d 1081 (7th Cir. 1984) *cert.denied,* 471 U.S. 1017 (1985)(Title VII does not prohibit an employer from firing a male airline pilot, who following sex reassignment surgery, attempted to return to work as a woman.).

b. Sommers v. Budget Marketing, Inc., 667 F.2d 748 (8th Cir. 1982)(The discharge of an employee who presented himself as a female when applying for a job was not actionable under Title VII.).

c. Holloway v. Arthur Anderson & Co., 566 F.2d 659 (9th Cir. 1977)(Title VII does not prohibit discrimination against transsexuals because the word "sex" in the statute was to be given its plain meaning.).

d. Rentos v. Oce-Office Systems, 1996 WL 737215 (S.D. N.Y. 1996)(Every federal court that has considered the question has rejected the application of Title VII to a transsexual claiming employment discrimination.

e. James v. Ranch Mart Hardware, Inc., 1994 W.L. 731517 (D. Kan. 1994)(Congress did not intend to ignore anatomical classification and determine a person's sex according to the person's psychological makeup when it passed Title VII.)

f. Dobre v. National R.R. Passenger Corp., 850 F.Supp. 284(E.D. Pa. 1993)(Title VII does not forbid discrimination against a male who wants to become a female.").

g. Emanuelle v. United States Tobacco Co., 1987 LW 19165 (D.Ill. 1987), *aff'd*, 886 F.2d 332 (7th Cir. 1989)(Discrimination against transsexuals is not within the jurisdiction of Title VII.).

h. Doe v. United States Postal Service, 1985 WLL 9446 (D.D.C. 1985)(Title VII's prohibition against sex discrimination is not synonymous with a discrimination based on individual's transsexualism.).

i. Powell v. Read's, Inc., 436 F.Supp. 369 (E.D. Md. 1977) (Discrimination against transsexuals is not reached by Title VII.).

j. Voyles v. Ralph K. Davies Medical Center, 402 F.Supp. 456 (N.D. Cal. 1975), *aff'd*, 570 F.2d 354 (9th Cir. 1978)(Employment discrimination based on a person's transsexualism is not proscribed by Title VII.)

k. Estate of Gardiner, 42 P.3rd 120 (Kan. 2002)(Male-to-female transsexual can not marry a biological male and claim a "widow's" share of his estate.)

l. Goins v. West Group, 635 N.W.2d 717 (Minn. 2001)(It is not sex or sexual orientation discrimination when an employer prohibits a male-to-female transsexual employee from using restrooms designated for women employees.)

l. Littleton v. Prange, 9 S.W.3rd 223 (Tex.Crt. of Ap. 1999)(Male-to-female transsexual can not marry a biological male and then bring a wrongful death claim.).

4. Sexual Orientation Discrimination Cases

a. U.S. Constitution

i. Loving v. Virginia, 388 U.S. 1 (1967)(State's anti-miscegenation law criminalizing opposite race marriages violated equal protection. Such laws are a type of impermissible race discrimination because "but for" the race of the person the defendant married, the act would have been legal).

ii. Romer v. Evans, 517 U.S. 620(1996)(State constitutional prohibition of all legislative, executive or judicial action at any level of state or local government to protect homosexual persons violated equal protection. Failed to satisfy rational basis review because it was motivated by animus toward a particular group.)

iii. Stemler v. City of Florence, 126 F.3rd 856 (6th Cir. 1997)(Followed Romer. Permitted a selective enforcement claim by a woman driver alleging that she was arrested on charges of drunk driving because she was perceived to be a lesbian and male driver of the other car was not because he was perceived to be heterosexual.)

iv. Weaver v. Nebo School Dist., 29 F.Supp.2d 1279 (D. Utah 1998)(Followed Romer. School district's decision not to assign a teacher as the volleyball coach because of her sexual orientation had no rational basis and violated the Equal Protection Clause

v. Glover v. Williamsburg Local School District Brd. of Education, 20 F.Supp.2nd 1160 (S.D. Ohio 1998)(Followed Romer. School board's failure to renew a gay teacher's contract violated the teacher's equal protection rights as it was motivated by impermissible animus.).

v. Fricke v. Lynch, 491 F.Supp. 381 (D. R.I. 1980)(1st Amendment protects the right of a male homosexual student to attend his school's senior prom with a male date.)

b. Title VII of the Civil Rights Act of 1964[1] and State Mini-Title VII Statutes

Bibby v. Phila. Coca Cola Bottling Co., 260 F.3rd 257 (3rd Cir. 2001), *cert. denied*, 122 S.Ct. 1126 (2002) (Harassment on the basis of sexual orientation is not prohibited by Title VII.)

Simonton v. Runyon, 232 F.3d 33 (2nd Cir. 2000)(Title VII does not prohibit sexual orientation discrimination).

Spearman v. Ford Motor Co., 231 F.3d 1080 (7th Cir. 2000), *cert. denied*, 532 U.S. 995(2001).(Harassment based solely upon a person's sexual orientation is not an unlawful employment practice under Title VII.).

Higgins v. New Blance Athletic Shoe, Inc., 194 F.3d 252 (1st Cir. 1999)(Harassment because of sexual orientation is not proscribed by Title VII.).

Mimms v. Carrier Corp., 88 F.Supp2d 706(E.D. Tex. 2000)(Neither sexual orientation nor perceived sexual orientation constitute protected classes under Title VII.).

Broadus v. State Farm Ins. Co., 2000 WL 1585257 (W.E. Mo. 2000)(Harassment because of homophobia is not protected by Title VII.)

ii. Turner v. Oregon Health Sciences University, 971 P.2d 435 (Or.App. 1998)(State Title VII prohibition against sex discrimination covers sexual orientation discrimination.)

---

[1] 42 U.S.C. §2000e-2(a)(1).

III. Proposed Taxonomy of Terms and Their Definitions

A. SEX

1. Definition

   Basic biological, anatomical, physiological distinctions made among individuals on the basis of chromosomal genetics, internal reproductive organs, genitalia, or hormones.

2. Major Categories

   a. Female / Woman

   Defined by:
   Genetic chromosomes: XX chromosomes;
   Reproductive glands: ovaries, uterus, vagina;
   Genitalia: vagina, clitoris, labia;
   Hormones: estrogens.

   b. Male / Man

   Defined by:
   Genetic chromosomes: XY chromosomes;
   Reproductive glands: testes, prostrate;
   Genitalia: penis & scrotum;
   Hormones: androgens.

   c. Transsexual / Intersexual

   A lack of congruence between or among genetic chromosomes, reproductive glands, genitalia and / or hormones by birth or medical procedure.

3. Sexual Identity

   The sex category with which one self identifies.

B. GENDER / SEX ROLE

1. Definition

   The socio-cultural meanings assigned to being female or male.

2. Major Categories

   a. Feminine

   Characteristics included in the dominant socio-cultural meanings assigned to being female.

b. Masculine

Characteristics included in the dominant socio-cultural meanings assigned to being male.

c. Transgender

Lack of congruence between one's dress/demeanor/behavior and the dominant, socio-cultural definition of *feminine* or *masculine*.

3. Gender Identity / Gender Expression

The gender category with which one self-identifies and/or expresses through dress, demeanor, etc.

C. SEXUAL ORIENTATION

1. Definition

The sex to which one is physically attracted.

2. Major Categories

a. Homosexual

Same-sex physical attraction.

i. Lesbian

A woman who is physically attracted to women.

ii. Gay

A man who is physically attracted to men.

b. Heterosexual

Different-sex physical attraction.

c. Bisexual

Both-sex physical attraction.

The Substantive and Procedural Due Process Rights of Students Accused of Criminal Behavior in School and the Educational Rights of Adjudicated Youths

By

Frank Brown, Ph.D.
Cary C. Boshamer Distinguished Professor of Education
University of North Carolina at Chapel Hill

EDUCATIONAL LAW ASSOCIATION
ANNUAL CONFERENCE
NEW ORLEANS, LA
November 14-16, 2002

The major question for this paper was how to protect students in our elementary and secondary schools with constitutional due process where attendance is compulsory and at the same time maintain a safe school environment? The paper present changes in juvenile justice and the impact of these changes on children. The paper also concludes that changes in juvenile justice results in a form of social control of non-hegemonic groups, minorities by a dominant hegemonic group, a collection of white European ethnic groups. Non-hegemonic or marginalized groups are those that cannot protect themselves through the political process, singularly or in combination with other groups. It is also argued that the best avenue for moving children of color away from the justice system for criminal behavior is for schools to teach information about the Constitution through the justice system. Young people, including children of color, will obey the laws if they have a better understanding of the laws and their relationship to the Constitution, the courts and the political process. The "crime control" laws enacted in the last two decades have had a negative impact on children of color engaged in delinquent behavior.

Conservative members of states and federal governments are using a call for improved "crime control" measures as a mechanism to control members of marginalized groups (including recent immigrants) to fashion strict criminal codes to control and restrict the constitutional rights politically marginalized groups (McNeil, 2002:5). In the United States, from the 1960s to the present has increasingly used crime control measures to restrict the fundamental rights of citizens with the major negative results falling on members of non-hegemonic groups; and in America the non-hegemonic groups are African Americans, Hispanics, Native Americans and Asian Americans. This paper examines the impact of these crime control measures designed to exercise increased social control over the poor, mainly people of color and specifically, restrictions of the constitutional rights of minority children enrolled in our public elementary and secondary schools. This research is restricted to public schools because the Bill of Rights in our Federal Constitution applies to state action as required by the 14th Amendment to the Constitution and not to the private actions of non public schools. Further, most children of color are enrolled in our public schools.

In 1994 Congress replaced the 1988 Omnibus Crime Control and Safe Streets Act, which became know as the Violent Crime Control and Law Enforcement Act of 1994. The 1994 Act also became know as the "Three Strike" Crime Bill that also directed the U.S. Sentencing Commission to make mandatory prison sentencing for certain illegal drug use and sale. For example, crack cocaine sale would carry a 5 year sentence for a first offense but the same violation with the sale of power cocaine would carry a one year sentence; and the amounts of each drug would be different: 5 grams of crack cocaine would demand the same sentence as 500 grams of power cocaine, a 100 to 1 ratio. At the end of 1995, African Americans constituted 85 percent of all person convicted of drug use or sale under this law (Brown, 2000). The 1994 Crime Bill also made it possible to prosecute children as young as 13 years old as adults.

The federal government and 26 states have three-strikes laws. But California is the only state that does not require that the third strike to be a violent crime. In California a non-violent crime of residential burglary may qualify as a first or second strike (Skipitares, 2002A: 1-3). In the seven years since passage of California's Three Strike Law, non violent residential burglary is the second most common third strike accounting for 11 percent of all cases with robbery being the most common. In 2002, nearly half of the state's 7,206 three strikers are doing 25 years to life for non-violent third strikes, including drug possession and petty theft. For example, Jed Miller in 1995 was sentenced to the maximum for stealing two bicycles and a truck; and another person drew a 25 years to life sentence for shoplifting two bottles of cognac from a Safeway store (Skipitares, 2002B: 1-3). African Americans make up 7 percent of California's population and 31 percent of the overall prison population and 44 percent of the three strikers in prison (Skipitares, 2002C: 1-3). Even in Santa Clara County south of San Francisco where African Americans comprise only 4 percent of the population they comprise 32 percent of the third strikers. Some claim that robbery; the most frequent crime for which three strikes defendants are jailed is disproportionately aimed at African Americans; and the statute is picking on African Americans as a group.

The California "three strike" law has been challenged in court and has reached the U.S. Supreme Court (Lane, 2002:A2). April 2002, the Court agreed to hear a case on appeal from the 9th Circuit ruling on California's statute concluded that the Constitution "does not permit the application of a law which results in a sentence grossly disproportionate to the crime (Lane, 2002:A2). Approximately 57 percent of the 7,000 individuals serving sentences under the California law were convicted on nonviolent third felonies, including 644 convicted of drug possession and 340 convicted on charges of theft (Lane, 2002:A2). The cases involve *Lockyer v. Andrade* (No. 01-1127) and *Ewing v. California* (No. 01-6978). Oral arguments are expected in the fall of 2002 and decision due before July 2003. In one case, the person drew a life sentence under the statute for petty theft to support a drug habit.

Also connected to the new Crime Bill of 1994 was the passage by Congress The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 the removed from direct supervision of poor children by their mothers or primary care keepers who were forced to leave home to fine low paying jobs. Thus, many children went without supervision and their parents could not reward them with most necessaries with the pay from these jobs, which motivated many children to commit crimes mainly against property (theft). For example, since 1994 when the State of Georgia enacted strong juvenile crime laws, 75 percent of children arrested were African Americans and 90 percent of those convicted were African American; and most of juveniles arrested and convicted were Black boys who are viewed as super predators (Brown, 2002:107).

We address the following major issues regarding the law and children 18 years and younger enrolled in public schools who are defined here as juveniles. We also address other issues designed to help the reader gain a better understanding of the new limits and conditions for children of color living in America: the changing demographic of the school age population; the changing interpretation of the constititutional rights of students by the U.S. Congress and state legislative bodies, federal and state courts; the changing definition of juvenile crimes and implications of these changes for students brought juveniles before adult courts for violation of federal and state laws. However, the legal process has never been devoid of values, preferences, or policy positions. Ultimately, the legal process has always acted as an expression of social control. This control includes juvenile behavior.

Laws affecting juveniles, however, cannot be confined to students' lives while enrolled in school but their consequences for life long implications. The federal government and many states have enacted "three strike" laws requiring a minimum sentence for a person convicted of a third felony and in California the third strike does not have to be a violent crime. Juvenile crimes that were traditional brought before a juvenile court where the records were closed to the public are now available to be counted as a "third strike" later in life. This transfer of student delinquents from juvenile courts to adult courts have other implications: and are 13 and 14 year olds mature enough to defend themselves in an adult court; do they have enough knowledge to defend their rights under the Constitution. The transfer of juveniles to adult courts differs from state to state as to the age in which a student may be transferred and who carries the burden of proof in deciding such a transfer. Even the language differs from state to state: some refer to such a transfer as a "waiver" of juvenile rights, "bindover" from juvenile court to adult court or a "trigger" delinquent behavior requiring a transfer from a juvenile court to an adult. We will provide sample cases to illustrate our position but an exhaustive review of all court cases on this subject is beyond this review.

All elementary and secondary students are not considered alike under the laws of the federal government and state governments. Special education students, at least theoretically are treated differently if they have an emotional disability. Children from ages three to 21 with a disability must be provided with special education services according to the federal law, the Individuals with Disabilities Education Act (IDEA) requires that special education students must be provided with an Individual Education Plan (IEP) (20 U.S.C. δ 1412(a)(1)(B)(i)(ii) and may not be expelled from school due to violent behavior if that behavior is caused by his/her disability. The U.S. Supreme Court in *Honig v. Doe* (1988*)* ruled that such behavior must not be a manifestation of the student's disability. Schools may suspend such a student for 10 days for a cooling off period, only, unless they have evidence that the student may do harm to himself/herself, another student or teacher (See *East Islip Union Free School District v. Anderson, 1994*; *School Board of Pinellas County v. J.M. by L.M., 1997*). However, IDEA will not prohibit school officers from reporting criminal behavior by a special education student to law enforcement authorities or supply a special education student's disciplinary records to law enforcement authorities (20 U.S.C. δ 1415(k)(9). School authorities have the right to transfer a student with a disability to an interim alternative setting for up to 45 days for the possession of a weapon or illegal drugs on school grounds or at a school function (20 U.S.C. δ 1415(k)(1)(A) under the Gun-Free Schools Act and the Drug-Free Schools Act.

These laws extend beyond schools to housing for the poor. This law affects the poor only, because middle-income families do not qualify for federally funded public housing. The Federal "Zero-Tolerance" laws of 1994 and 1996 involving weapons and illegal drugs on school grounds also included weapons and drugs possession in any federally funded housing (Stevenson, 2002:C1, C8). The law states that anyone entering a public housing unit who is connected to illegal drugs will cause the tenant to be evicted even if the tenant even if the tenant did not know the visitor was involved with illegal drugs. The U.S. Supreme Court upheld this part of the law as just but some lower courts are not abiding by the strict legal guidelines supported by the Supreme Court (Stevenson, 2002). For example, a public housing resident who likes to braid hair to make extra income, had a potential client to inquire about getting his hair braided and made an appointment but was arrested for drug use before he could keep his appointment. The Public Housing Authority in Durham, North Carolina sought an eviction of the tenant because that person was observed by an under cover agent visiting her home. However, a North Carolina Appellate Court ruled in favor of the tenant and her three small children. But, the importance of this case should not be lost on minority children who are convicted of using or selling illegal drugs, or being in the presence of those who traffic in drugs. If so, their parents may be evicted and if they become involved with drugs and are convicted, they cannot return home after serving time in prison for that offense. This case involved a disabled mother with three small children but others are not likely to be as fortunately. If for any reason the children of this mother become involved in drugs and wish to attend college, they will not be able to qualify for government guaranteed student loans. Again, it is unlikely that the wealthy will not find themselves in this position because mainly children from poor and lower middle income families will need and can qualify for such loans.

In addition to changing the rules of the game for juvenile justice, states are now requiring schools to share juvenile delinquent behavior with law enforcement agencies and social service agencies. In 2000, ten states increased requirements by school personnel and school boards to improve school safety but several went further to foster greater cooperation between schools, the police and the courts (Dagley, 2001:305-309). Colorado authorized information sharing between schools and other service agencies and law enforcement. Information to be shared included incidents that rise to the level of public safety such as truancy and disciplinary records maintained by school authorities. In Florida schools must provide access to the school district's database on students' records. Iowa authorized peace officers to make reasonable efforts to notify parents of students who violate school rules; and share these data with juvenile courts and social service agencies. Maine, Minnesota, and Missouri permit the disclosure of school records of pre-adjudicated juveniles to their criminal justice systems. New York requires their juvenile courts to provide notice to schools of enrolled juveniles sentenced for crimes. Virginia requires law enforcement officers to inform schools of drug law violations. Washington requires education records to be provided upon request by social service agencies and the courts; and set a minimum sentence for the allowable number of days of suspension for the consumption of controlled substances and alcohol on school grounds.

In a technology-based society, the sharing of information has important life implications for young delinquents. In the past, young delinquents who appeared before a juvenile justice system were accorded a certain degree of privacy; there records were closed to all public agencies. But if juvenile delinquent records must be shared with law enforcement agencies and later in life when they seek employment where criminal background checks are required, finding employment may be difficult or impossible. Research tells us that African American males who cannot find employment and have little chances of finding legal employment cannot find a female who will marry them, even when they father children with their female companions (Stack, 1974); and it appears logically that this situation holds true for other minority males. This situation will increase the number of single parent head of household and increased poverty for children of color.

Minority Population Changes

The minority student population in America increased from 10.4 million in 1985-86 to 13.7 million in 1994095 which constitutes 34 % of k-12 school enrollment in 1994-95 from 29% in 1985-86 (Garcia, 2001:25). A majority of the high school graduates in California, Hawaii, Mississippi, New Mexico, and the District of Columbia. By 2006, about 50% percent of all K-12 students will be minority students (Garcia, 2001:25). Changes in the size and composition of the K-12 student population should have enormous consequences for schools, including the languages and experiences they bring to school will influence the curriculum and how schools functions. In 2000, 64 % of the children were white, non-Hispanic, compared to 79% in 1972: 15% are Black, 4% are Asian, 1% Native American, and 16% are Hispanic (Imig, 2002:17). The percentage of school age students speak a language other than English or have difficulty speaking English has doubled over the past two decades, increasing from 2.8% to 5.0% in 1999(Imig, 2002:17). According to Harold Hodgkinson (1999:13) two factors serve to increase minority enrollments in our schools: immigration and fertility. Nearly 85% of immigrants come to this country from non-European countries; and the average Black female gives birth to 2.6 children compared to 1.7 children for the white population which is not enough to replace the white population (Hodgkinson, 1999:13). By 2020, half of the students will be non-white; and by 2050 or sooner half of all Americans will be non-white. The white school age population will continue to decline and the minority school age population will continue to increase (Hodgkinson, 1999:13). Today, more than 180 different language groups are represented in LEP programs funded under Title VII (Garcia, 2001:65). Many of these students also qualify for support under Title I programs for at-risk students. Also, many minority students are immigrants and need special services.

There is a concentration of minority children in one race urban schools where resources are limited and "crime control" is a major safety and political issue. This concentration makes it easier to target minority children for criminal behavior. The recent decision by the U.S. Supreme Court ending their 1954 decision in *Brown v. Board of Education* to racially integrate the public schools will likely increase the ability of local governments to target minority students for greater social control with crime and safety issues. Beginning in 1960 whites left the inner cities for suburbia in large numbers to escape school integration (Flemming, 1975:55-60); and for whites who remained in the cities, intra-district segregation became the norm with ability grouping or tracking and the placement of minority students in special education classes (Flemming, 1975:60-62). The concentration of minority children in single race schools will make it easier to target this population for further regulation through crime control mechanisms supported by legislative bodies and the courts.

Juvenile Crime and Minority Life in America

In 1974 when Congress enacted the Juvenile Justice and Delinquency Prevention Act, which authorizes the establishment of the Office of Juvenile Justice and Delinquency Prevention to oversee community-based juvenile treatment, programs to deal with status offenders. The juvenile justice system is the step child part of the total justice system from its beginning (Reader, 1996:479).

Juvenile crime is not new in American but the rationale for changing the way we treat juvenile delinquents is new. In 1970, Ramsey Clark (1970: 35) former U.S. Attorney General under President Lyndon B. Johnson addressed the causes of crime in America concluded that in 1968: most individuals arrested for serious crimes were African Americans and the most serious risk is that racism may cause many white Americans to misunderstand the meaning of crime among poor Blacks because crime flows directly from racism, poverty and injustice if you are poor and a minority.

In 1968 two thirds of all persons arrested for serious crimes were under 21 years of age but crime by minors is less violent than adult crimes (Clark, 1970:219-220). The law may leave you without any rights but it will not ignore you because its major goal is to protect the wealthy from the poor juvenile delinquents (Clark, 1970:227). Millions of poor people have been forced by the state to testify against themselves and those they know (Clark, 1970:293) despite the Fifth Amendment and the *Miranda Rule* approved by the U. S. Supreme Court which states that a person arrested must be made aware his/her rights under the Fifth Amendment; and provided representation by an attorney paid for by the State if he/she can not afford one.

Some judges sentence long, some short (Clark, 1970; 204). There are examples of inequality in sentencing daily, often in different courtrooms and the same courtroom. Some judges regularly give juvenile offenders prison terms for first-offense car theft, while others turn them over to the custody of their parents. In March 2002, a state trail judge Boston became concerned when two offenders came before his court for drug related offenses, one white who was a repeated offender and one African American a first time offender; and presented to his court by the same prosecutor/district attorney. The prosecutor recommended a one-year jail sentence for a first time offender, the African American; and probation and no jail time for the white person with multiply drug offenses for the same drug type on the same day before the same judge. The judge was so concerned that he issued a public statement and asked for another review of the case for the African American offender.

If you are minority and poor the law may not honor your rights under the U.S. or State constitutions but it will not ignore you (Clark, 1970; 227). A powerless person accused of a crime is helpless against the power of the state via the police; and many powerless minority juveniles have been imprisoned by the state with the insistence that they testify against themselves and their friends. Further, accused minority juveniles could spend many weeks and months in jail waiting for a trial and miss time in school being educated. The sole purpose of law enforcement is to maintain control over juvenile behavior as viewed and defined by the hegemonic group; and the question remains, how can the powerless or marginalized groups gain power or in this case get fair treatment from society's behavioral control agencies?

Causes of Juvenile Crimes

Schools are in a position to help mediate the criminal behavior of students of color if teachers have the proper attitude (Johnson, 1996:682-684). But you cannot teach a child you do not love, respect, or understand. For most children, school occupies a student's live for six or seven hours a day for 180 days a year of 13 years. Exposure to education has a strong impact on students' behavior.

Despite the influence of education on juvenile behavior in reducing school crime, it continues. Crime still exists on school grounds. Yet, schools continue to improve safety measures to reduce juvenile delinquency on school grounds in order to increase safety for students and teachers. Researchers cite several factors influencing juvenile delinquency: education, more school dropouts commit crimes than those who remain in school and graduate; gender, males exhibit more delinquent behavior than females; race and ethnicity, racial and ethnic minority youths exhibit more delinquent behavior than majority youths; drug, more juveniles who use drugs are confined to youth correctional institutions throughout the country (Johnson, 1996:752-767).

There is a strong correlation between a child's racial status and family income level and his/her school behavior. It is within the family as a social unit that children learn nurturing, morals, and basic social values. The social economic status of the family also strongly influences a child's behavior in school. A child of color from a poor family generally resides in an unsafe neighborhood, receives a poor education, has possible gang influence, and receives poor parenting. One can argue that the elimination of poverty would cure most juvenile delinquency but such an argument in a capitalist society seems contradictory. Poverty appears necessary to maintain a free market system based upon capitalism.

School Crime

Recent juvenile crime in public elementary and secondary schools reported by the U.S. Department of Education and the U.S. Department of Justice (Kaufman and Associates, 2001:vii-viii, 61-62,69, 132) cited the following figure:

- The percentage of students in grades 9 through 12 threatened or injured with a weapon on school property has not changed significantly in recent years, ranging from about 7 to 8 percent of students reported being threatened with a with a weapon.
- In 1999, 12 through 18-year-old students living in urban and suburban locales were equally vulnerable to serious violent crime at school. Away from school, however, urban students were more vulnerable to serious violent crime than were

suburban students and suburban students were more likely to experience serious violent victimization than were rural students. Yet, student vulnerability to theft at school and away from school in 1999 was similar in urban, suburban, and rural areas.

- Young students (ages 12 through 14) were more likely than older students (ages 15 to 18) to be victims of crime at school. However, older students were more likely than young students to be victimized away from school.
- Elementary schools were much less likely than either middle or high schools to report any type of crime in 1996-97. Elementary schools were much more likely to report vandalism (31 percent) than any other crime (19 percent or less).
- At the middle and high school levels, physical attacks or fights without a weapon were the most commonly reported crime in 1996-97 (9 and 8 per 1,000 students, respectively). Theft or larceny was more commonly at the high school than at the middle school level (6 versus 4 per 1,000 students).
- Over the 5-year period from 1995-1999, teachers were victims of approximately 1,708,000 crimes at school, including 1,073,000 thefts and 635,000 violent crimes (rape or sexual assault, robbery, and aggravated and simple assault. On average, this translates into 79 crimes per 1,000 teachers per year.
- During the 1995 through 1999 period, senior high school and middle school teachers were more likely to be victims of violent crimes (most were simple assaults) than elementary school teachers (38 and 54 respectively), versus 16 crimes per 1,000 teachers.
- Teachers were differentially victimized by violent crimes at school according to where they taught. Over the 5 year period from 1995 through 1999, urban teachers were more likely to be victims of violent crimes than suburban and rural teachers (39 versus 22 and 20, respectively, per 1,000 teachers.
- In the 1993-1994 there were students' physically attacks at school, 12 percent of all elementary and a student, and 4 percent threatened secondary school teachers with injury. This represented about 341,000 teachers were victims of threats of injury by students that year, and 119,000 teachers were victims of attacks by students.
- The percentage of public schools that reported violent crimes to the police was 56.7; and minority enrollment was about 46.7 for a school less than 5 percent minority; 57.7 percent with a minority of 5 to 19 percent; 58.1 percent of schools with a minority of 20 to 49 percent; and 68.3 percent of the schools reported a crime to the police with a minority enrollment of 50 percent or more. The number of crimes reported to the police for the respective minority enrollment categories were: 700, 800, 1,500, and 1,200. The social economic status of a school as measured by free or reduced lunch eligibility was not as significant for low income student enrollment that exceeded 35 percent: less than 20 percent, 54.4; 21 through 34 percent, 53.2; 35 through 49 percent, 59.4; 50 through 74 percent, 58.8; and over 75 percent of the students on free or reduced lunch program, 59.2 percent of the public schools reported a crime to the police.
- The percentage of public schools reporting one or more serious crimes to the police based upon the schools' minority enrollment by the respective categories: less than 5 percent, 5-19 percent, 20-49 percent, and over 50 percent were 1.8,

3.2, 3.6, and 4.0; and for less serious crimes reported for the same minority categories were 22.3,27.4,31.5 and 31.7 respectively.

- The percentage of public schools with a law enforcement office presence during a typical week by minority enrollment levels and by school locale: In city, urban fringe, town and rural school the percentage for the 1996-1997 school year were 13, 7, 5, and 1 respectively. In schools with minority enrollments of less than 5 percent, 5-19 percent, 20-49 percent, and over 50 percent the police presence was 1, 6, 7, and 13 percent of the schools for the respective minority enrollment categories.

SCHOOL CRIME AND THE COURTS

New York City was the first American city or state to open a juvenile detention facility in 1825 but in 1899, Illinois became the first state to adopt a uniform juvenile code, and established the country's first juvenile court (Reader, 1996:479). Until the 1950s most juveniles were confined to juvenile detention facilities for delinquent behavior; and the courts were given jurisdiction over those who committed adult crimes or exhibited non-criminal status type behavior. Status offenders include truants, runaways, children who cannot be controlled by their parents or guardians, and those considered incorrigible (Reader, 1996:19).

It is well established that school officials do not need a search warrant or even probable cause to search a student's belongings of contrabands such as illegal drugs or weapons such as guns and knives (*State v. Crystal B,* 2000). But, a recent case that came before the Kansas High Court (*In the Matter of L.A.*, 2001) is an excellent example of how most state courts deal with the rights of juvenile crimes on school property. This case involved a petition by a student to suppress evidence of illegal drugs found on his person. The juvenile contended that (1) the search by school officials constituted governmental action, which violated his Fourth Amendment rights, and (2) his admission after a **Miranda** warning to a law enforcement officer was not admissible because a prior unwarned statement tainted it. The Kansas High Court (*In the Matter of L.A.*, 2001) concluded that:

1. At the hearing on a motion to suppress evidence of illegal drugs found during a school search, the state bears the burden of proving to the trial court the lawfulness of the search and seizure. Great deference is given to the factual findings of the trial court.

2. The accommodation of the privacy interests of schoolchildren with the substantial interest of teachers and administrators in maintaining order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law.

3. The legality of a search of a student by a teacher or other school official depends on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider whether the action was justified at its inception, second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place.

4. Under ordinary circumstances, a search of a student by a teacher or other school official will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school.

5. A search of a student will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

6. The statutory function of a school security officer is to protect school district property and the students, teachers, and other employees on the premises of the school district. A school security officer is not employed by an entity whose primary responsibility is law enforcement. During an investigation of a violation of school policy, a school security officer is not required to give a student **Miranda** warnings (a right to remain silent and a right to counsel under the 5th Amendment to the U.S. Constitution).

7. The Sixth Amendment to the United States Constitution, as applied to the states through the Fourteenth, requires that defendants tried as adults who are accused of serious crimes be afforded the right to trial by jury, and the right is applicable to any offense where imprisonment for more than six months is authorized.

8. Under the Kansas Juvenile Justice Code, there is no federal or state constitutional right to a trial by jury. However, if the offense the juvenile is accused of would be a felony as if an adult committed it, the judge has the discretion to order a jury trial for the juvenile.

New Federal Standard of Review for Criminal Behavior

The Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104- 132, 110 Stat. 1214 ("AEDPA") altered the standard of review federal courts must apply when reviewing applications for a writ of habeas corpus. The Act applies to all habeas corpus petitions filed after April 24, 1996. The Act, including the amended standard of review, 28 U.S.C. § 2254(d) imposes the following standard of review that a federal court must utilize when reviewing applications for a writ of habeas corpus (the right to appeal a conviction to a higher court of law). An application for a writ of habeas corpus on behalf of a person in custody due to the judgment of a state court shall not be granted with respect to any claim adjudicated in state court proceedings unless the adjudication: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

Federal courts are bound by a state court's adjudication of a petitioner's claims unless the state court's decision was contrary to or involved an unreasonable application of established federal law (*Franklin v. Francis*, 1998; *Harris v. Stovall*, 2000). A federal court must presume the correctness of state court factual determinations (*Cremeans v. Chapleau,* 1995). Federal courts must give complete deference to state court findings unless they are clearly erroneous. In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a state court, a determination of a factual issue made by a State court shall be presumed to be correct.

In another case, where the defendant was a minor under the law at the time the criminal act was committed (*Key, 2001)*, the court concluded that a minor petitioner was informed of his *Miranda* rights and understood them even as a legal minor without the assistance of parents or guardians. While petitioner's parents or guardians were not present during his interrogation, there was no evidence that petitioner requested that they be present or requested an attorney. The court concluded without consideration that petitioner was sixteen years old at the time of his offense and his interrogation; and while he was not a legal adult, petitioner had completed the tenth grade and was of normal intelligence. Like this state court, most state courts will consider juveniles mature enough to be tried before an adult under adult rules without constituting a violation of their basic constitutional rights for their decisions made in court as a minor without the assistance of parents or guardians.

Student Search and Seizure

In this section we will address the law and conditions surrounding the search and seizures of property from juveniles or young people in school. A minor is anyone 18 years old or younger and must be turned over to a juvenile court if a crime has been committed. In 1994, Alabama, like many other states changed its statutes on juvenile delinquency in two ways: a prosecutor may petition to have a child who is 14 years or older tried as an adult; or any one 16 years or older who commits a felony is automatically tried as an adult (Cross, 1998:25-30).

The federal government and the states have increased the number of adult criminals by either lowering the age for bring juveniles to adult courts and increasing the amount and kinds of behavior classified as criminal (Rosenberg, 1996). In general the courts, federal and states, use a balancing test that weighs a student's privacy interests against the government's interest in maintaining order, discipline and security in schools (Rosenberg, 1996:12-15). When applying the Fourth Amendment to public school officials, the U.S. Supreme Court has ruled that neither a search warrant nor probable cause is required for searches of students; but instead the standard for searches of students by school officials is a reasonableness test (*New Jersey v. T.L.O., 1985)*. It seems logical to assume that evidence seized by school administrators from students by searches based upon a reasonable suspicion will be considered lawful by a court of law. Nor are students given full protection under the Eight Amendment against excessive punishment and a due process hearing before punishment may be administered (*Ingraham v. Wright,* 1977); and students do not have the right to a jury trail in juvenile court proceedings.

The U.S. Supreme Court has concluded that under the Fourth Amendment to the U.S. Constitution, searches of students by school officials do not have to adhere to the standard of "probable cause" imposed upon law enforcement officers off school property but upon the "reasonableness" of the search in light of all the circumstances. There must be reasonable grounds to believe that the search will reveal a violation of school rules or produce evidence of unlawful activity. The states remain free to provide greater protection for students, as Louisiana and California have done. In *New Jersey v. T.L.O.*, (1985) the U.S. Supreme Court responding to the search of a student's purse by the school's assistant principal that yielded marijuana and the school turned the matter over to the police. A juvenile court hearing was held and the girl was adjudged a delinquent. This judgment was appealed. Contending that her constitutional rights had been violated by the search of her purse, she contended that the evidence should have been excluded from the juvenile court proceeding. Her appeal was upheld by the New Jersey Supreme Court but the U.S. Supreme Court took the case and ruled that the search did not violate the Fourth Amendment prohibition against unreasonable search and seizure if: the search was justified by a reasonable suspicion and the scope and conduct of the search was reasonably related to the circumstances which gave rise to the search, and school officials took into account the student's age, sex and the nature of the offense. The Court also upheld the right of school officials to require students who participate in extracurricular activities to submit to drug testing (*Vernonia School District v. Acton,* 515 U.S. 646 (1995).

Police Involvement

Several state courts have taken the position that when police are involved in a student search, the Fourth Amendment standard of probable cause must exist and the students must be advised of their rights. A middle grade student brought a gun to school to protect him from bullies who had harassed him (*In the Matter of V.P.*, 2001). School officials and a school police were advised of the gun and escorted him an office for questioning where he admitted to having a weapon. The officer left the room during the questioning and the student asked to speak to his mother and lawyer. A Texas district court placed the student in a treatment facility for 14 months. The student appealed the decision to the Texas Court of Appeals arguing that his confession and the seized gun evidence should have been suppressed because he had not received his *Miranda* warnings. The Texas Appeals Court denied his appeal. The Texas Appeals Court's decision in this case is similar to rulings from state courts in Rhode Island, New Jersey, Massachusetts, Florida and California that school officials are not required to meet the strict requirements of probable cause and need not issue *Miranda* warnings when questioning students about school rules violations (*In the Matter of V.P.*, 2001).

However, a Minnesota Court of Appeals held that the questioning of a middle grade student in the principal's office with the participation of a police officer was a custodial interrogation requiring the reading of the student's criminal rights (*In the Matter of the Welfare of G.S.P.*, 2000). The presence of the police officer made the *Miranda* warning necessary and as a result, the student's admissions could not be used in juvenile court proceedings. The warnings are required when a law enforcement officer initiates questioning after a person has been taken into custody or has been deprived of freedom in any significant way, his Fifth Amendment Rights must be upheld (*In the Matter of the Welfare of G.S.P.*, 2000). The student was told that he had no choice but to answer the question. But in general, students have a lesser expectation of privacy than that enjoyed by the general population, as their movements are controlled by teachers and administrators from the moment they arrive at school (*Milligan v. City of Slidell*, 2000).

A court case in Alaska gives another view of juvenile justice given the state's definition of who carries the burden of proof in transferring a minor from the juvenile justice system to adult courts. In 1994, Alaska amended its juvenile justice provisions to include an automatic waiver law from their juvenile justice court to an adult court (May, 1998). The automatic waiver law removes from the protection of the Alaska's Juvenile Justice for children, without a judicial hearing, sixteen or seventeen year-olds who are charged with (1) a class A felony and a felony crime against a person; or (2) first degree arson. The removal of a minor from juvenile supervision causes the minor to be charged, prosecuted and sentenced in an adult court. The statute also provides that if a minor is convicted of an offense that would not originally triggered the waiver provision, the minor must prove, by a preponderance of the evidence, that he/she is amenable to rehabilitative treatment: the seriousness of the offense, the minor's history of delinquency, the probable cause of the delinquent behavior, and facilities available for treatment. But, the state must show that the minor cannot be rehabilitated by the age of twenty.

The ultimate result of the Alaska automatic waiver law and the burden-shifting provision is to entrust to the prosecutor substantial authority to determine a juvenile's proper jurisdiction (May, 1998). This determination continues to be influential even when judicial processes have determined that the evidence does not support it. The charges continue to influence disposition of the minor's case even where the minor is acquitted of the triggering charges. Critically, the state interest in automatic waiver cases also lies in the total discretion of the prosecutor to decide in which forum the minor will be adjudicated, eradicating the need for a judicial waiver hearing. The initial charging decision combined with a grand jury indictment determines whether the juvenile will be tried in adult court.

The lack of a meaningful judicial determination before transferring a minor to an adult court has caused some states to reject similar waiver or transfer provisions as unconstitutional. The Supreme Court of Delaware rejected the constitutionality of their state statute that provided for automatic transfer children who had committed crimes as minors but who had reached the age of eighteen prior to adjudication (May, 1998:142-144). The State High Court found the statute arbitrary and bearing no rational relationship to a legitimate government interest, because the prosecutor could exercise complete discretion in delaying a trial until the minor's eighteenth birthday. The Court determined that the lack of judicial review in the waiver process resulted in uncontrollable authority of the state to impose potential arbitrary charging decisions. Pursuant to the waiver statute, decisions are not made in public with reviewable judicial determination taking into account a child's individual circumstances, but behind the closed door of the prosecutor's office (May, 1998:145).

If a juvenile is originally charged with an offense that would not trigger the waiver provision, the minor is presumed to be amenable to treatment under the Alaska's Delinquency Rules for Juveniles for the same lesser crime, the state bears the burden to have the juvenile placed in an adult court. However, California, in a similar situation shifts the burden of proof to the juvenile. The presumption against the juvenile merely serves to make it more difficult for the minor to return a juvenile court, and reduces the state's responsibility at the waiver hearing. The minor can be returned to the juvenile system for sentencing if he or she is not convicted of the serious felony but is instead convicted of a charge that would not have triggered the waiver provision. However, to regain the benefits of juvenile treatment, the minor must demonstrate at a judicial hearing that he or she is amenable to treatment in juvenile rehabilitation programs. The burden then shifts to the minor to justify a return to the juvenile justice system; and for a child of color this burden could prove difficult.

The U.S. Supreme Court in *Kent v. United States* (1996) noted that the juvenile justice system was not providing young offenders with the same protection accorded adults nor the proper care designed for children. In *Gault* (1967), the Court held that juveniles were entitled to the same procedural due process protections accord adults such as the right to counsel; the right to notice of specific charges; the right to confront and cross examine witnesses; the right to remain silent; and the right to subpoena witnesses in defense. The Court expanded these protections further in *Winship* (1970) by requiring that quilt must be proven beyond a reasonable doubt in juvenile proceedings. But the Court in *McKeiver v. Pennsylvania* (1971) refused to extend the right to a trail by jury to juvenile proceedings; and later Court placed more restrictions on the constitutional rights of students on school property. The Court in *Ingraham* (1977) held that excessive corporal punishment of students did not violate their Eighth Amendment rights and their procedural due process rights did not require a pre-punishment hearing. The Court in *New Jersey v. T.L.O.* (1985) and *Vernonia School District v. Acton* reduced the constitutional protection of students against unreasonable searches and seizes.

In general, school police officers or school liaison officers have the right to search students without providing them with the constitutional rights afforded adults, even if a school police officer had directs, participated, or acquiesces in the search, only reasonable suspicion, rather than probable cause, is required to justify the search, since the school police officer is a school official employed by a district School Board (Bough, 2000). The courts feel that once a school official has reasonable suspicion that a student is carrying a weapon he or she may perform the search without concerns about the student's Fourth Amendment rights. The courts distinguished searches for weapons as opposed to drugs because a school official or police officer needs only reasonable suspicion to conduct such a search.

Can a minor perform a quality defense of his rights in an adult court? The following case will highlight some of the difficulties of such a case. Jamie Key (*Jamie Key v. U.S., 2002)* was found guilty of possessing narcotics with intent to distribute while legally a minor but was tried as an adult and convicted. He was assigned a court appointed attorney as his defense counsel in whom he claimed that he was not adequately represented at trail by counsel. Key was incarcerated at the time under a multi year sentence. He petitioned the court to vacate, set aside, or correct his sentence of 20 years under 28 U.S.C. § 2255 ("§ 2255 petition"). His petition was denied.

At trial, a jury found Key guilty of ten counts of possessing heroin with intent to distribute in violation of 21 U.S.C. § 841. Key was a minor at the time of his arrest, but he was tried as an adult and received a 20-year sentence. On appeal, the Seventh Circuit affirmed his conviction and sentence (*U.S. v. Jarrett, 1998)*. Key asserted that his counsel incorrectly advised him that he could only be sentenced based upon the amount of heroin reflected in the indictment in which he was specifically named and he was a juvenile when the crimes were committed. According to Key, his counsel stated that his offense level according federal sentencing guidelines would have to serve about seven years in prison if found guilty. But, his counsel did not advise him that under U.S.S.G. § 1B1.3(a)(1)(B) he would be liable for the entire amount of heroin sold during the course of the conspiracy, with a mandated 20 years in prison if found guilty. Key claimed that if he knew this information he would not have risked a jury trial, but would have entered into a plea bargain to the stipulated amount of heroin; and sought a 3 point reduction for acceptance of responsibility under U.S.S.G. 3E1.1(a) & (b). His counsel was ineffective because he incorrectly advised him about his sentence. But to establish that counsel provided ineffective assistance, the Key had to demonstrate: (1) that his attorney's performance was deficient; and (2) that such representation prejudiced his case. The first prong is satisfied by a showing that counsel's performance fell below the "objective standard of reasonableness" guaranteed under the Sixth Amendment. To satisfy the second prong, the he must show that because of counsel's errors, the outcome of his trial or sentencing was unfair. Because counsel is presumed to have been effective by the court, the Key bore a heavy burden in proving that counsel was ineffective. The court held that attorneys have a duty to inform their clients of a plea agreement offered by the prosecution but Key did not seek a plea, therefore non-existed. At the same time, Key asserted that his attorney never advised him of the value of a plea which would have gotten him as little as 78 months or 6.5 years of prison time instead of 240 months or 20 years in confinement. Key did not meet the court's definition of ineffective counsel, which reveals how difficult it is for anyone to correct a mistake or challenge the behavior at trail of an incompetent court appointed counsel. This lack of expert advice by Key's counsel added an additional 11 years in prison for a person who committed a non-violent crime as a minor. As Ramsey Clark observed in 1970, the law may not accord a poor youth his/her constitutional rights, but the law will not ignore you either. A major function of law enforcement is to preserve social order in a capitalist society by controlling the behavior of those in society lacking the basic needs of life. The groups that fit into this category in the United States are racial and ethnic minority families and their children.

Conclusions and Solutions

The major question was how to protect children of color enrolled in K-12 schools where attendance is compulsory and at the same time maintains a safe school environment? We argue that the best avenue is to teach information about the justice system as it relates to the Constitution. More knowledge about the Constitution and justice should motivate more children to obey the law and improve their chances of becoming productive citizens.

We find that the criminal statutes in this country are unfairly designed to control the delinquent behavior of juveniles from minority groups compared to the juveniles from the controlling hegemonic majority group. The children from minority group backgrounds are more likely to experience needs deprivation (poverty) and seek illegal means to meet those needs. Second, minority youths are monitored more closely by law enforcement agencies than majority youths. Third, certain legal statutes are harsher on the illegal behavior more common to minority youths than for offenses more common among majority youths. For example, power cocaine typically used by majority youths carries less of a penalty than crack cocaine typically used by the poor and minority youths. Fourth, prosecutors, judges and juries are more related and understanding of the cultures and backgrounds of majority youths than minority youths. Finally, the easiest way to reduce this unequal treatment between poor minority children in school and majority children in general would be to eliminate poverty which produces a greater need to get involved in delinquent behavior. The elimination of poverty or for members of minority groups to gain parity with the dominant hegemonic group seems impossible in a capitalist society. We assume that these punitive legal conditions will continue to exist for minority children. We do not believe that a call for an change in present anti crime legislation at the federal and state levels will yield meaningful result in the immediate future. Therefore, we will focus on advising schools that serve large populations of minority children to take measures to educate their students, parents and communities about laws aimed at controlling the behaviors of minors in minority communities.

We recommend that schools find ways to integrate lessons about the criminal justice system into the curriculum. In predominately minority schools, it is more important to teach about the criminal justice system than to teach curricula units on drug abuse, sex or any of the other related topics because all of these topics interact in meaningful ways with the criminal justice system. A curriculum unit on the criminal justice system may be included with a unit on the Constitution in order to give the Constitution greater meaning for the daily lives of students. Students will soon learn that the 4th, 5th and 8th

Amendments to the U.S. Constitution have different means for police officers, juvenile courts and adults in placing meanings on these Amendments. We believe that once students and parents understand the criminal statutes and justice system they will be in a better position to make discriminating decisions about their behavior and if illegal behavior follows they will be in a better position to defend them. Minority students and their parents can better gage the impact of these on the future well being of their children. For example, parents will now know that delinquent behaviors they were involved in during their school days, similar behaviors today will get their children expelled, placed in a juvenile detention center or in jail; if a felony is committed, the student may draw a life sentence later in life for a repeated offense under federal and state "three strike" laws; if they wish to attend college and were involved drugs, they will not be able to qualified for a federal student loan; and will not be able to find employment with a government agency if they were ever convicted of a felony or drug use, where criminal background checks are required; their parents cannot live any federally funded public housing; and they may not be able to vote in state and federal elections which is a necessary step to improving one's condition in this country. Schools may qualify for special funding from the Federal Government's Program for Sate Schools but we believe improve knowledge about the criminal justice at the earliest age is the best possible way to influence behavior of children in school, which is the focus of this review.

We recommend that if given a choice, delinquent school children should be first treated at school and secondly treated through the juvenile justice system instead of the adult courts. For school districts we recommend the placement of delinquents in alternative schools designed to return these students back to regular schools as soon as possible; and for special education children we recommend that schools seek to correct their behavior through IEPs. Most special education students are from minority groups and predominately male, the largest group incarcerated by the crime justice system; and the federal laws should work to reduce the number of minority males entering alternative education centers within local school systems and the juvenile justice system.

Students who have been expelled should be given home instruction, which is required for special education students, but should be available to all expelled students. A critical component of the curriculum for expelled students should include a unit on the criminal justice system and the Constitution, which may be included in a civics course for middle grade students and a history course for high school students.

A minor has an interest in being sentenced as a juvenile. Adult sentencing is significantly different than juvenile sentencing (May 1998). As a juvenile, a minor is entitled to privacy, treatment, and leniency. Juveniles convicted as adults face harsher penalties and a permanent criminal record. Minors have little likelihood of rehabilitation when incarcerated with adult felons in prisons that lack suitable treatment programs. What treatments are recommended for juvenile delinquents who are expelled from school, placed in an alternative school, tried in a juvenile justice system or in an adult justice system?

Alternative schools are used for students who cannot be adequately educated in regular schools because of delinquency behavior. Alternative schools prevent violence by: first, these schools prevent violence in schools because these prevent offenders from roaming the streets; second, alternative programs focus on the education of troubled students; and third, these schools provide juveniles with an education to decrease future criminal behavior. Alternative schools attempt to teach self-control, encourage a sense of community and provide proper counseling for this population of students (Beresh-Taylor, 2000:140-145). Each school district should implement crisis prevention and response teams, mediation and conflict resolution programs; and violence prevention should be comprehensive. Further, because potentially violent students come from diverse backgrounds, schools must not target a particular group of students for treatment for violence behavior (Beresh-Taylor, 2000:184-185). States should mandate that all suspended and expelled students be provided with education in an alternative school or with home instruction. The Gun-Free Schools Act of 1994 (20 U.S.C. δ 8921(b)(2) states that: Nothing in this subchapter shall be construed to prevent a State from allowing a local educational agency that has expelled a student from such a student's regular school setting from providing educational services to such student in an alternative setting.

The use of the justice system in America to control the behavior of children of color in a capitalist system is not likely change to benefit the children of color in the future; therefore, we make our recommendation based upon this assumption. The evidence is clear that these socially regressive criminal statutes more negatively affect the people of color than any other group in America, even for poor whites. Poor whites are members of the hegemonic group and therefore, their communities are not targeted in the same regressive manner as minority communities and receive protection from the criminal justice system that most poor minority children do not receive. This is true in school and outside of school in the community.

Finally, we recommend that schools institutionalize the dissemination and discussion of the law and citizenship in the U.S. States with a course or units in social studies courses at all grade levels. Even in kindergarten, it is important for a children living in public housing to understand the harm in being associated with anyone dealing or using drugs on themselves and their families. This is important even if they are not involved with drugs, their association may cause their family to be evicted as tenants in federally funded public housing. These classes should produce a broad base discussion of the criminal justice system and growing up in American; make it easier to secure films and speakers on the subject; and make for a more critical analysis of the U.S. Constitution under which the laws discussed in this paper are deemed constitutional. The Constitution as discussed in most social studies classes, seems more like a fairy tale than what most people of color experience under the Constitution in their daily lives. The use of the criminal justice system as a basis for studying the Constitution should be mandatory in every school system if we wish children to understand and honor those laws. Ignorance of the law, as we have seen in this paper is not allowed in courts for juveniles, so we owe to our children to inform them about life in the same manner we inform them about other harmful commodities and events in life-sex education, proper diets, physical conditioning, and harmful drugs. Jamie Key (2002) discovered too late that ignorance of the law, even as a minor increased his prison sentence by 12 years. We encourage school system and textbook companies to include extensive units on the criminal justice system as it relates to the Constitution. This suggestion goes hand in hand with this recommendation because textbook writers has a tremendous impact on what gets taught in schools. We anticipate that if children discuss these topics in schools, they will more than likely carry on these discussions at home and in their communities; and a multiplier effect will take place where students of color and their families will gain more knowledge about the criminal justice system and its impact on their lives. Evidence strongly suggests that proper education for children of color about the criminal justice system in their respective states and the Federal Constitution is the most feasible option with the cost being supported with public funds in an institution where all most attend. Finally, there is also strong evidence that this country is willing to pay any cost to incarcerate children for criminal behaviors in the harshest way regardless of the cost or the reasons for criminal behavior, including poverty. Therefore, education becomes critically important in anti-delinquent behavior prevention.

REFERENCES

Beresh-Taylor, Laura (2000). *COMMENT: Preventing Violence in Ohio's Schools,* **33 Akron Law Review 311.**

Bough, Andrea G. (Spring 1999). *Searches and Seizures in Schools: Should Reasonable suspicion or Probable Cause Apply to School Resource/Liaison Officers?* **67 University of Missouri at Kansas City Law Review 543.**

Brown, Elaine (2002). **The Condemnation of Little B**, Boston: Beacon Press.

Clark, Ramsey (1970). **Crime in America: Observations on Its Nature, Causes, Prevention and Control**, New York: Pocket Books.

Cremeans v. Chapleau, 62 F .3d 167, 169 (6th Cir.1995).

Cross, Kristen Simms (Fall 1998). *COMMENTARY: When Juvenile Delinquents Are Treated as Adults: The Constitutionality of Alabama's Automatic Transfer Statue*, **50 Alabama Law Review 155.**

Dagley, David L. (2001:276-321). *Federal and State Legislation* in Charles J. Russo, **The Yearbook of Education Law 2001**, Education Law Association, Dayton, OH.

East Islip Union Free School District v. Anderson, 625 N.Y.S.2d 852 (N.Y. Sup. Ct. (1994).

Flemming, Arthur S., (Commission Chair, January 1975). **The Federal Civil Rights Enforcement Effort-1974: Volume III-To Ensure Equal Educational Opportunity**, Report of the U.S. Commission on Civil Rights, Washington, DC.

Franklin v. Francis, 144 F.3d 429 (6th Cir.1998).

Garcia, Eugene E. (2001). **Hispanic Education in The United States**, Lanham, MD: Rowman & Littlefield Publishers, Inc.

Gault, 387 U.S. 1 (1967)

Harris v. Stovall, 212 F.3d 940 (6th Cir. 2000).

Hodgkinson, Harold L. (December 1999). *The Uneven Spread and Blurring of Student Diversity*, **The School Administrator** 56 (11): 13-14.

Honig v. Doe, 484 U.S. 305 (1988).

In the Matter of V.P., No. 03-00-0042-CV, 2001 WL 578518 (Texas Appeals, Austin 2001).

Ingraham v. Wright, 430 U.S. 651 (1977).

Kaufman, Phillip and Associates (October 2001). **Indicators of School Crime and Safety: 2001**, U.S. Department of Education, NCES 2002-113 and U.S. Department of Justice, NCJ 190075

Kent v. United States, 383 U.S. 541, 555 (1996)

Imig, David G. (January 2002). *American Association of Colleges for Teacher Education President's Contextual Scan* from Y. T. Moses' **Scanning the Environment in the AAHE Bulletin**, 53 (53): 7-9, June 2001.

Ingraham v. Wright, 430 U.S. 651 (1977).

In the Matter of L.A., Supreme Court of Kansas, 270 Kansas 879, 21 P.3d 952 (March 16, 2001).

In the Matter of the Welfare of G.S.P., 610 N.W.2d651 (Minn. App. 2000).

Jamie Key v. U.S., U. S. DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN, 98 C 5144 (March 29, 2002)

Lane, Charles (April 2, 2002). *Court to Review "Three Strikes": Justices Agree to Hear Two Cases Under California Sentencing Law,* **Washington Post.**

May, Kimberly S. (December 1998). *Note: Shifting Away From Rehabilitation: State v. Ladd's Equal Protection Challenge to Alaska's Automatic Waiver Law,* **15 Alaska Law Review 367.**

McKeiver v. Pennsylvania, 403 U.S. 528 (1971).

McNeil, Jr., Donald G. (April 28, 2002:5). *Whodunnit? In Europe, Often the Immigrant,* **The New York Times.**

Milligan v. City of Slidell, 226 F.3d 652 (5th Cir. 2000).

New Jersey v. T.L.O., 469 U.S. 325 (1985).

Reader, W. Don (Spring 1996). *They Grow Up So Fast: When Juveniles Commit Adult Crimes, The Law of Unintended Results*, **and 29 Akron Law Review 477.**

Rosenberg, Irene Merker (Fall 1996). *A Door Left Open: applicability of the Fourth Amendment Exclusionary Rule to Juvenile Court Delinquency Hearings*, **24 American Journal of Criminal Law 29.**

School Board of Pinellas County v. J.M. by L.M., 957 F.Supp. 1252 (1997).

Skipitares, Connie (April 2, 2002A). *Three Strikes Law Appears to Have Met Goal, State Prisons Aren't Overwhelmed with Petty Criminals* **The Mercury News**, http://www.bayarea.com/mld/mercurynews/news/special_packages/

Skipitares, Connie (April 2, 2002B). *Sentencing Decisions involve Judgment Calls, The* **Mercury News**, http://www.bayarea.com/mld/mercurynews/news/special_packages/

Skipitares, Connie (April 2, 2002C). *Figures on Black Inmates Fuel Racism Debate,* **The Mercury News**, http://www.bayarea.com/mld/mercurynews/news/special_packages/

Stack, Carol (1974). **All Our Kin**, New York: Basic Books

State v. Crystal B., Court of Appeals of New Mexico, 24 P.3d 771 (November 30, 2000).

Stevenson, John, (May 5, 2002:C1, C8). *Judge Blocks Move to Evict Mother, Kids: Public Housing Trying to Keep Drugs out of Communities,* **The Herald-Sun Durham (NC).**

United States v. Jarrett, 133 F.3d 519 (7th Cir. 1998).

U.S. Department of Education, Office for Civil Rights, **Directory of Elementary and Secondary School Districts and Schools in Selected Districts: 1976-1977,** and 1984 and 1986 Elementary and Secondary School Civil Rights Survey, U.S. Department of Education, National Center for Education Statistics (1991:68).

Vernonia School District v. Acton, 515 U.S. 646 (1995).

Winship, 397 U.S. 358 (1970).

Negligent Liability Issues Involving Colleges and Students: Does an Ethic of Caring Heighten Institutional Liability?

Joseph Beckham, Florida State University

Douglas Pearson, University of West Florida

Since the landmark decision in *Bradshaw v. Rawlings* (1979), the question of how and to what extent institutions of higher education could be held liable for negligence involving students has preoccupied courts. In an earlier era, sovereign immunity regularly insulated higher education institutions from liability. As state legislatures abrogated immunity doctrines, judges initially immunized colleges and universities by rejecting an in loco parentis notion of the relationship between student and institution. Over time, judges retreated from principles that effectively denied relief to injured student-plaintiffs and began to extend liability, initially in cases involving inspection and maintenance of premises. Institutional liability has since been extended to the duty of care associated with the landlord-tenant relationship, particularly in instances involving assaults by third parties. In a limited number of cases, judges have recognized a special duty relationship predicated on the foreseeable nature of a risk of injury and a judicially imposed duty of reasonable care applicable to institutions of higher education. [See Robert Bickel and Peter F. Lake, "The Emergence of New Paradigms in Student-University Relations: From 'In Loco Parentis' to Bystander to Facilitator," 23 J.C.& U. L. 755 (1997)] This paper reviews recent case law related to the liability of higher education institutions and asks whether current institutional policies create a heightened risk of legal liability for negligence involving students.

Third-Party Assaults on Students

Evolving out of cases based on premises liability, institutional liability for attacks on students by third parties has been prominent in the case law. Students who are subject to attack allege a negligent failure by the institution to provide adequate safety and security. The weight of judicial opinion, congruent with the Restatement (Second) of Torts (1964) emphasizes that there is no duty to control the conduct of a third person or to prevent him or her from causing harm unless a special relationship exists that imposes such a duty. For example, in *Ruchalski v. Schnectady County Community College (App.Div. 1997)* a student who was injured when struck by a traffic cone thrown by another student in a college cafeteria could not recover damages on a theory that the college owed a special duty of care. The court noted that the college could not have foreseen the act that led to the injury and no special duty to protect the student could be established. The general rule extrapolated from the case law is that there is no duty to protect a student from a third party attack or injury unless the institution, acting as a landlord, had reason to foresee the likelihood of criminal conduct that would endanger the safety of the student-tenant

Hall v. Board of Supervisors (1981) reflects the limited view of foreseeability held by courts in the early 1980s. In *Hall*, a student shot by a non-student in the lobby of her dormitory claimed that the institution had breached its duty to protect her (1) by requiring her to live on campus without warning her of the dangers to which she would be subjected, (2) by failing to maintain adequate security, and (3) by failing to bar her assailant from the campus. In its decision, the state appeals court asserted that prior isolated criminal activities did not create a duty for the institution to warn all residents of probable dangers, asserting there was "...no proof that living on campus increased the hazard above the ordinary" (p. 1126). The court held that in cases where spontaneous unforeseeable violence occurs, unless a causal relationship is established between security inadequacies on the college's part and an injury sustained to the student, negligence would not be established: "Even the most sophisticated security forces are powerless to prevent a spontaneous, sudden and unprovoked act of violence" (p. 1126).

However, as attacks on students in residence halls received widespread national attention, judges, motivated by social policy concerns, began to place increased responsibility on institutions to protect students. This greater potential for institutional liability, predicated on an apparent judicial expansion of the scope of foreseeable risk, was evident in the case of *Mullins v. Pine Manor College* (1983). In *Mullins*, a female student who was raped on campus after being abducted from her dormitory room by an unidentified assailant prevailed on her claim that the college, as landlord, was negligent. The Supreme Judicial Court of Massachusetts affirmed the trial court's decision holding the college negligent, and determined that the college had a duty to protect the student primarily because there was a general community consensus that the college would take steps to provide security despite prevailing perceptions of college students as adults.

> Of course, changes in college life, reflected in the general decline of the theory that the college stands in loco parentis to its students, arguably cut against this view. The fact that a college need not police the morals of its resident students, however, does not entitle it to abandon any effort to ensure their physical safety. Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm. (p. 335-336)

The appellate court reasoned that since the college had establish a security force, it had an obligation to ensure a degree of care grounded in the theory that "...a duty voluntarily assumed must be performed with due care" (p. 336). In addressing the college's argument that the incident was not foreseeable since there had not been any previous incidents of third party assaults in campus residence halls, the court asserted that, "Prior criminal acts are simply one factor among others that establish the foreseeability of the act of the third party" (p. 336). Because the college had routinely warned students during orientation of the dangers inherent to being housed near the city of Boston, there was sufficient evidence that the risk of a criminal act was both foreseeable and foreseen by the college.

Several cases that followed *Mullins* support the contention that the landlord-tenant relationship creates a special duty to protect students residing in residence halls. In the case of *Cutler v. Board of Regents of State of Florida* (1984), a state appeals court allowed a female state university student who was assaulted and raped in her dormitory room to amend her complaint, asserting that "recent Florida decisions have held that a landlord, who recognizes and assumes the duty to protect his tenants from foreseeable criminal conduct, may be liable if he fails to take reasonable precautions to prevent injury to his tenants from this conduct" (p. 414-415). In *Miller v. State* (1983), the Court of Appeals of New York affirmed negligence on the part of the university for failing to protect a female student from rape in a residence hall. The appeals court noted:

> As a landowner, the State must act as a reasonable [person] in maintaining property in a reasonably safe condition in view of all the circumstances....Under this standard, a landlord has a duty to maintain minimal security measures, related to a specific building itself, in the face of foreseeable criminal intrusion upon tenants....Thus, defendant here had a duty to take the rather minimal security measure of keeping the dormitory doors locked when it had notice of the likelihood of criminal intrusions. (p. 883)

Negligence predicated on the landlord-tenant relationship was affirmed in *Nero v. Kansas State University* (1993), in which a female student who was sexually assaulted in her residence hall persuaded the Supreme Court of Kansas that Kansas State University owed a duty of reasonable care to students in residence halls once it exercised its discretion to make such housing available to students. While declining to hold that the university-student relationship itself imposes a duty on institutions to protect students, the court did rule that a university has a duty to regulate and supervise foreseeable dangers occurring on its property. The court ordered remand, finding that the trial court erred in granting summary judgment to the institution, and emphasized that the trial court must resolve the question of whether, at the time of the attack, the institution's agents should have foreseen the attack on the student.

Attacks on students that occur on the campus, but outside of resident halls, present greater challenges for student-plaintiffs, both because the landlord-tenant relationship applicable to residence halls is unpersuasive and because it is more difficult to establish a foreseeable risk. This reluctance to impose a duty on colleges to protect students or control their behavior while on the campus is reflected in numerous cases. In *Smith v. Day* (1987), an attempt was made to hold Norwich University responsible for injuries sustained by plaintiffs shot on campus by a cadet who attended the University. [See also, *Adams v. State*, (1994) in which an invitee on the campus who was struck by a bullet allegedly fired from a residence hall was unable to establish a special duty relationship based on a duty to protect her while attending a cultural event sponsored by the institution.] The plaintiffs argued that a special duty relationship existed between the student and the university because of the degree of control exerted by the University over its students via institutional rules and regulations. The Supreme Court of Vermont, however, agreed with earlier judicial opinions that creating such a duty would go against public policy.

> In the instant case, compelling public policy reasons exist against extending the common law understanding of duty. First, most college students, including the defendant Day, are adults and must take full responsibility for their actions....Second, it is unrealistic to expect the modern American college to control all of the actions of its students....Third, making a university liable for this type of action would inevitably lead to repressive regulations and a loss of student freedoms, thus contravening a goal of higher education: "the maturation of students." (p. 599)

In *Rabel v. Illinois Wesleyan University (1987),* an Illinois appeals court reviewed injuries sustained to a female student at Illinois Wesleyan University after a fraternity student forcibly grabbed her from the lobby of her residence hall and attempted to run with her through a gauntlet of his fraternity peers. The plaintiff received serious injuries to the head when the male student tripped and dropped her onto a sidewalk. She alleged that the university, "due to its policies, regulations and handbook created a special relationship with its students and a corresponding duty to protect its students against the alleged misconduct of a fellow student" (p. 356). The appeals court concluded that the imposition of such a duty on the university was unrealistic.

> (W)e have considered the likelihood of the injury from the existence of the condition here, the magnitude of guarding against it and the consequences of placing the burden on the defendant. Upon consideration, we do not believe that the university, by its handbook, regulations, or policies voluntarily assumed or placed itself in a custodial relationship with its students, for purposes of imposing a duty to protect its students from the injury occasioned here. The university's responsibility to its students, as an institution of higher education, is to properly educate them. It would be unrealistic to impose upon a university the additional role of custodian over its adult students and to charge it with the responsibility for assuring their safety and the safety of others. (p. 360-361)

Absent substantial evidence of a known foreseeable risk, judges have been unwilling to impose institutional liability based on the recognition of a special duty relationship. Two cases with dramatically different outcomes serve to illustrate this principle. In *Klobuchar v. Purdue University (1990)*, a university student who was injured after her husband kidnapped her from campus brought an action against the university for failing to provide adequate security. An Indiana appeals court affirmed summary judgment in favor of the university after determining that there was no material fact that gave rise to a special duty to protect the plaintiff. In its decision, the court emphasized that even in light of a duty to the plaintiff that would be the same general duty afforded to the public, there was nothing that would have alerted the University to any possible danger as the plaintiff admitted that "...neither she, nor anyone else, told the University that her husband might be a threat to her" (p. 171).

In contrast, in the case of *Sharkey v. Board of Regents (Neb. 2000)*, a state university was held to owe a duty of care to a husband and wife, both of whom were students, in an instance in which the husband was stabbed during a confrontation with another student. The confrontation arose from the third student's alleged harassment of the wife while on the campus, which had been reported to campus security. When campus security took no steps to address the harassment, the husband intervened and was stabbed in an attack. The Supreme Court of Nebraska held that the university owed a duty of care to the students as invitees and reasoned that the institution's police force had been made aware of the harassing student's specific behavior on more than one occasion and knew of instances of criminal activity on the campus. It found that it was reasonable to belief the harassing behavior would escalate into violence, and held that the institution had a duty to take reasonable, precautionary measures to protect the students.

When addressing student claims of negligence that involve injuries off campus, judges are reluctant to create a duty of care either to maintain a safe environment or to require the institution to warn students. This general rule is clearly applicable to instances when students leave the campus to engage in activities unrelated to the institution's sponsored programs or activities *[See generally, Conroy v. Marquette University (1998) and Hartman v. Bethany College (1991)].*

However, student-institutional relationships involving some degree of supervision or control are considered one form of special duty relationship under the Restatement, and courts have recognized that higher education institutions owe a legal duty to students to provide proper instruction and adequate supervision in classroom contexts that involve high risks, foreseeable harm, and the instructor's special expertise. [See generally, *Fu v. State (2002)* (explosion in chemistry laboratory); *Garrett v. Northwest Mississippi Junior College (1996)* (injury in using milling machine); *Delbridge v. Maricopa County Community College (1994)* (fall from utility pole in training class).]

Whether the degree of supervision or control creating a special duty relationship extends to student participation in off-campus programs has been the subject of recent judicial speculation leading to mixed results. In *Bloss v. University of Minnesota (1999)*, a student participating in an international study abroad program was sexually assaulted by a taxi cab driver. Despite contentions that the sponsoring institution was negligent in failing to secure housing closer to the program site, failing to provide safe transportation for students, failing to inform of the risks to students, and failing to protect students from a foreseeable harm, the state appeals court affirmed summary judgment for the institution on the basis of qualified immunity. The court reasoned that the suit arose out of discretionary functions performed by state officials in planning and implementing an international program intended to provide cultural immersion for students. Similarly, in *McNeil v. Wagner College (1998)*, a student injured in a slip and fall on ice while attending an overseas college program could not establish a claim for negligence based on an institutional employee's voluntary act of assisting her with medical care. In this case, the student alleged negligent supervision of her medical care when the director of the international program sought to act as an interpreter for her in the Austrian hospital where she was treated. The court rejected the claim based on the general principle that in loco parentis does not apply at the college level.

However, recent cases suggest that the liability for sponsoring off-campus programs can arise under circumstances in which a duty of care is applicable and the institution could or should reasonably foresee a risk of harm. In *Nova Southeastern University v. Gross (2000)*, the Supreme Court of Florida ruled that a university could be found negligent if it assigned a student to a mandatory off-campus internship site that institutional officials knew to be unreasonably dangerous. The graduate student was abducted from the parking lot of her assigned internship site, robbed and assaulted. University officials had been made aware of a number of criminal assaults that had occurred at or near the internship site, but provided the student with no adequate warning of the danger. While refusing to adopt a general duty of supervision for the safety of students, the court found that the institution had a duty to use ordinary care in providing educational services and programs. Noting that the case was not based on premises liability, the court emphasized that the "special relationship" in this case was limited to the foreseeable risk involved, the institution's knowledge of that risk, and the failure to warn the student of the known danger.

> As Nova had control over the students' conduct by requiring them to do the practicum and by assigning them to a specific location, it also assumed the. . .correlative duty of acting reasonable in making those assignments. In a case such as this one, where the

> university had knowledge that the internship location was unreasonably dangerous, it should be up to the jury to determine whether the university acted reasonably in assigning students to do internships at that location. (p. 89)

The institution's duty may also extend to instances of negligent hiring. In *Harrington v. Louisiana State Board (1998)*, a student in a culinary apprenticeship brought an action against a community college alleging that sthe director of the program had raped her The director admitted that he had been arrested and convicted for raping the student in his car after taking her with him on a series of visits to arrange student internships with local restaurants. Finding that the institution's agents made no inquiries about the director's past criminal behavior, which included several arrests and convictions, before hiring him, a state appeals court reversed a summary judgment motion on behalf of the college and held the institution was liable for negligently hiring the director.

Hazing Activities

Several recent decisions involving student injuries caused by hazing have departed from the presumption that institutions owe no duty to students. In *Furek v. University of Delaware (1991)* the Supreme Court of Delaware determined that the magnitude of the foreseeable risk and the institution's policies towards hazing imposed a duty of reasonable care for the safety of students. *Furek* involved a student injured in a hazing-related accident at a fraternity on the University of Delaware campus. In its decision, the court emphasized that judges have been reluctant to impose institutional liability because higher education institutions are not insurers of students' safety. However, the *Furek* court reasoned that the university's policies against hazing (which reflected state law mandates), the security system in place to protect students, and the university's knowledge of previous hazing incidents in fraternities created such a duty.

> The evidence in this record, however, strongly suggests that the university not only was knowledgeable of the dangers of hazing but, in repeated communications to students in general and fraternities in particular, emphasized the university policy of discipline for hazing infractions. The university's policy against hazing, like its overall commitment to provide security on its campus, thus constituted an assumed duty which became "an indispensable part of the bundle of services which colleges...afford their students." (p. 520).

The *Furek* decision concluded that changing societal attitudes toward hazing suggest that institutions are not free from all obligations to protect their students. On balance, the court found the likelihood of injury during hazing activities occurring on university campuses to be greater than the utility of university inaction. Imposing liability on the institution was based on the belief that the university had a degree of control over its premises, including the fraternity house, which was supported by its involvement in the regulation of fraternity life. This control, combined with the cumulative evidence that the incident was foreseeable, created a duty to protect the student from harm.

Adopting a different rationale justifying institutional liability for hazing, the Vermont Supreme Court, in *Brueckner v. Norwich University (1999)* examined the experience of a student attending a military college who was subjected to incidents of hazing that included verbal and physical harassment by upperclassmen known as "the cadre." The student reported the hazing incidents to university officials, but eventually withdrew from the institution, thinking that his situation would not improve. His scholarship was terminated and he brought suit against the institution. A lower court found the institution liable for assault and battery, negligent infliction of emotional distress, intentional infliction of emotional distress, and negligent supervision.

The Vermont Supreme Court affirmed the lower court's decision holding the institution liable for the tortuous conduct of the cadre and affirmed an award of compensatory damages. Applying the doctrine of respondeat superior, the court ruled that the university would be vicariously liable for the actions of the cadre if these cadets were acting within the scope of employment as agents of the institution. Although the institution had adopted policies against hazing, it had charged the cadre members with indoctrinating and orienting new students. The court reasoned that a jury could find that the members of the cadre were performing a general duty to indoctrinate and orient on behalf of the institution and the cadre's hazing activities were within the scope of employment. The institution was liable for the tortuous acts of the cadre both because the institution had authorized the indoctrination and orientation and because the institution was negligent in meeting a duty of reasonable care to control and supervise the cadre. [But see *Alton v. Texas A & M University (1999)* in which a federal appeals court rejected a claim that hazing by members of university's military training organization violated a student's due process rights.)

The Supreme Court of Nebraska used reasoning that paralleled the *Furek* decision in *Knoll v. Board of Regents (1999)*. In this case, a student who was injured in a hazing activity filed suit against the university, alleging that it acted negligently in failing to enforce prohibitions against hazing, consumption of alcohol, and physically abusive behavior. The state supreme court reversed a grant of summary judgment to the university, finding that the hazing activities were foreseeable by the university, which had knowledge of previous instances of hazing by other fraternities and of specific instances of possession of alcohol, alcohol abuse and assaults involving the fraternity that had subject the student to hazing. The court adopted the view that it is the risk reasonably to be perceived that is the determinant of whether a duty is owed.

Institutional liability for hazing activities increases with the degree of foreseeable risk involved. Recent cases in which individuals and fraternal organizations have been subject to suit for hazing that resulted in injuries to student may presage a heightened risk of liability [See *Nisbet v. Bucher (1997)* (Proximate cause was established by allegation student was forced to drink excessive amount of alcohol and was abandoned in a state of excessive intoxication by fraternity members.) and *Oja v. Grand Chapter of Theta Chi Fraternity (1997)* (Summary judgment precluded by allegation that pledge's drinking was imposed upon pledges as an implied condition of membership.)

Athletics

Because of the degree of supervision and control exercised over school sponsored intercollegiate athletic programs, several courts have imposed a special duty relationship in this particular context of student-institutional relationships. For example, in *Kleinknecht v. Gettysburg College (1993)* a federal appeals court upheld liability specifically predicated on a special duty relationship. After a student who had been recruited to play lacrosse suffered a fatal heart attack during practice, the parents of the student brought a negligence action against the college, arguing that a special relationship existed between the student and the college by virtue of the student's status as a member of the intercollegiate athletic team. A federal appeals court agreed, reasoning that because the student was recruited to play lacrosse and, at the time of his heart attack he was participating in a scheduled athletic practice for a college sponsored intercollegiate team, a special relationship existed that was sufficient to impose a duty of reasonable care.

Having determined that a special relationship existed, the court then reviewed the record to evaluate whether the incident was foreseeable and assess whether a duty of care was owed. The court determined that a member of the College's interscholastic lacrosse team could suffer a serious injury during an athletic event, and concluded the college owed a duty to the student to take precautions against the risks of injury. In making its determination, the federal court clearly intended to set limits on the class of students to which this decision would apply, stating:

> There is a distinction between a student injured while participating as an inter-collegiate athlete in a sport for which he was recruited and a student injured at a college while pursuing his private interests, scholastic or otherwise. This distinction serves to limit the class of students to whom a college owes the duty of care that arises here. Had (the student) been participating in a fraternity football game, for example, the College might not have owed him the same duty or perhaps any duty at all. (p. 1368)

Kleinknecht reflects the high degree of control a university must have over the student in order to persuade a court to impose a special duty of care. The court recognized that the College had actively sought out the student's participation on the lacrosse team by recruiting him, and that the student suffered the heart attack while participating in a scheduled and supervised lacrosse team practice. The court also pointed out that the relationship between colleges and student-athletes was not one in which the college was purely a bystander: "We cannot help but think that the College recruited [the student] for its own benefit, probably thinking that his skill at lacrosse would bring favorable attention and so aid the College in attracting other students" (p. 1368).

Following *Kleinknecht,* other courts recognized a special duty relationship applicable to circumstances in which the institution may be said to exercise a greater degree of control over students engaged in sponsored programs. For example, in *Searles v. Trustees of St. Joseph's College (1997),* a court held that an institution may be liable for injuries to student-athletes in school-sponsored programs when college coaches or trainers are found to have breached a duty to exercise reasonable care for student athlete safety. In this case, a member of a men's basketball team alleged that despite medical advice to the contrary, his college coach and an athletic trainer had insisted that the student continue to play basketball after several knee surgeries. Although the trial court granted summary judgment to the institution on the student's claims, the state appeals court reversed, holding that a duty of adequate supervision would arise from the level of control exercised by the coach and trainer over the athlete and finding that whether the duty was breached in this case was a question of fact for the jury's resolution.

The fact that an institution does in fact exercise a level of supervision and control over a student-athlete's training and participation in intercollegiate sports can create a duty of care to foresee potential risks. In *Moose v. Massachusetts Institute of Technology (1997)*, a Massachusetts appeals court affirmed a jury verdict in favor of a student-athlete injured while attempting a pole vault under the supervision of his coach. The student had sustained the injury when his heels hooked on the back edge of the landing pit and his head struck the unprotected surface on the track. Using a comparative negligence standard, the jury apportioned the fault proximately causing the injury between the institution and the student. On appeal, the state court emphasized that there was sufficient evidence for the jury to find that the risk of falling over the back of the padded landing pit was foreseeable and the coach's failure to evaluate the potential risk and take affirmative steps to reduce it was negligence. In a case with a similar result, *Trustees of Trinity College v. Ferris (1997)*, a student-athlete participating in rowing practice was injured when his team's scull collided with a scull rowed by the women's team. The women's' scull was in the wrong lane at the time of the accident, violating a navigation rule. Following a jury verdict in favor of the student-athlete on the negligence claim, the defendants appealed, contending that the student had assumed the risk of the activity and pointing the fact that the student had signed a release before participating in the practices. The state appeals court rejected this defense, ruling that the student athlete might have been aware of the general risks inherent in the sport, but a jury could find that he was not aware, and did not assume, the specific risk or harm associated with his injury.

Cases involving student-athletes almost always involve a defense that the student assumed the risk of injury. For example, in *Nova University v. Katz (1993)*, a student at Nova University who severely injured her foot during cheerleading practice brought an action against the university for negligence. The plaintiff alleged that the coach had failed to provide spotters for her when she fell while doing a cheerleading stunt and that he had generally failed to supervise the students. The jury ruled in favor of the student and the university appealed, arguing that the claim should have been barred by the doctrine of assumption of risk.

As a general rule, participants in athletic events properly may be held to have consented, by their participation, to those injury-causing events that are known, apparent or reasonably foreseeable consequences of participation. However, an institution generally has a duty to exercise reasonable care to protect participants from concealed or unreasonably increased risks that could not have been assumed. The state appeals court, while recognizing the risks inherent in cheerleading and assumed by students participating in the activity, pointed out that this assumed risk did not release the university from its responsibility to continue to provide proper supervision and instruction during a practice.

> Here, the cheerleader's conduct in going ahead with a stunt even though she knew spotters were not present may be characterized as implied qualified assumption of the risk. While she may have waived risks inherent in the sport itself, those do not include the failure to have proper supervision and to have spotters. She did not absolve the

> school of its responsibility for proper instruction and to properly supervise the activity. (p. 30)

The assumption of risk defense effectively insulated a state university from liability in *Schiffman v. Spring (1994)*. In *Schiffman*, a student on the women's varsity soccer team was injured when her foot became stuck in the mud while playing in a soccer match on the campus of another institution. She brought suit against the institution, alleging that the athletic director and coach were negligent by electing to hold a soccer match on a field that was wet, slippery, and muddy. The university prevailed on a summary judgment motion after the judge concluded that the plaintiff was fully aware of the condition of the field before she voluntarily agreed to participate in the soccer match, thus establishing an assumption of risk. The institution established that plaintiff's injury was not the result of a breach of duty; rather, it was "a luckless accident arising from the vigorous voluntary participation in competitive inter-scholastic athletics" (p. 483- 484). [See also *Rendine v. St.John's University (2001)* for a case in which a cheerleader, injured when she fell while performing a stunt, was held to have assumed the risk of the activity because she was under no compulsion to perform the stunt and had been advised that no spotter was available.]

The limits of institutional liability for negligence in the context of student-athletic injuries are illustrated in cases involving unsanctioned activities and intramural programs. In *Gilbert v. St. John's University (1998)*, a member of an unsanctioned college rugby team was seriously injured in a rugby match with an unofficial team of students from another institution. The student alleged that his institution had a duty to supervise the team, despite the fact that the college had withdrawn sponsorship and financial support for the team six years earlier. The college had also sanctioned the team and threatened to discipline students who played rugby under the guise of the college's sponsorship. The student asserted that the college was aware of the team's activities and had limited its activities to discouraging matches on campus. Adopting the view that courts have refused to impose a duty on institutions to supervise or control student conduct, a federal district court affirmed a magistrate's decision dismissing the student's action and granting summary judgment to the college. The court also emphasized that imposing such a duty when the student is off campus and outside the institution's custody or control is even more unlikely.

Similarly, in *Ochoa v. California State University (1999)*, a case involving a student who was struck by an opposing player in an intramural soccer game, a California appeals court ruled that the institution did not owe a duty to the student simply by organizing and sponsoring the game. The court took the position that soccer is a hazardous recreational activity and fisticuffs between participants were reasonably to be expected. Affirming summary judgment for the institution, the court emphasized,

> It is unclear how the policy of preventing future harm would be fostered by finding a special relationship between universities and the participants in their intramural events, since it is unclear how those events could proceed if every injury suffered by a participant might expose the university to liability. . . .(T)he likely consequences to the community would be the abandonment of intramural sports by colleges and universities, which would serve no one's interest. (at 772)

These cases establish that because of the degree of supervision and control associated with school-sponsored athletic programs, it is possible that a court recognize a special duty relationship. [In one of the few cases rejecting the special duty as applied to student athletes, *Howell v. Clavert (2000)*, the Supreme Court of Kansas found that the duty owed to student-athletes is that of a general duty of care, and declined to impose a special duty to provide adequate supervision, instruction, warning, and safe premises for a required activity. The decision, however, affirmed institutional liability under a comparative negligence standard in a case in which two student-athletes were struck from behind by a truck during a mandatory early morning conditioning run.] The university or college may be liable for an injury when it is clear that institutional officials did not exercise reasonable care to protect students from foreseeable injuries. [See *Wallace v. Broyles (1998)* for a case in which the Supreme Court of Arkansas determined that genuine issues of material fact precluded summary judgment in a case in which an athlete's suicide was alleged to have been proximately caused by the illegal and uncontrolled dispensing of controlled drugs by institutional employees.] To be foreseeable, the injury does not have to be specifically foreseen by the university, but need only fall into a general category of injuries were likely to occur during participation in an athletic event. To reduce the risk of liability in these cases, colleges and universities need to substantiate that students were warned and are aware of the risks inherent in engaging in athletic activities, although it is not necessarily to provide notice of the specific manner in which an injury might incur. It is also essential that institutions provide up-to-date training and supervision commensurate with the risks involved in the activity.

Alcohol Related Cases

Although institutional liability for alcohol-related injuries are substantially influenced by state law, judicial decisions confirm that an institution's general awareness of underage drinking on college campuses, or the adoption of university policies and regulations prohibiting such activities and providing for discipline for instances of misconduct, does not increase the risk of liability for these institutions. Dicta contained in decisions involving alcohol-related negligence claims reflect that appellate courts believe that imposing a duty on universities to prevent underage drinking would, in effect, represent a step back toward the creation of an in loco parentis responsibility for students, a step these appellate courts are unwilling to take because such an expectation is unrealistic and against public policy.

The leading case reflecting judicial reluctance to establish institutional liability involving alcohol-related student injuries is *Bradshaw v. Rawlings (1979)*. In *Bradshaw*, a federal appeals court held that there existed no special duty relationship between a college and a student that would impose upon the college a duty to control the conduct of a student operating a motor vehicle or to protect a student traveling to and from a class picnic. The injured student had been a passenger in the car of another student who had consumed alcohol at a college-sponsored function off the campus. When the student was injured in an automobile accident on the return trip to the campus, he joined the institution as one of several defendants in a negligence suit. In ruling that " the modern American college is not an insurer of the safety of its students" (p. 138), the federal appeals court emphasized that "College students today are no longer minors; they are now regarded as adults in almost every phase of community life" (p. 139).

The rationale in *Bradshaw* was followed in *Baldwin v. Zoradi (1981).* In this case, a student at California Polytechnic State University brought suit against the Trustees of the University and two of its dormitory staff members after she was seriously injured in an automobile accident involving several intoxicated students. The plaintiff alleged that the dormitory staff created a dangerous situation in that they knowingly permitted the students to consume alcoholic beverages in the residence halls and failed to take appropriate steps to control students. A California appeals court concluded that it would be impossible and, in some respects, improper, for the university to be expected to police and eradicate alcohol consumption on the campus.

> Although the consumption of alcoholic beverages by persons under 21 years of age is proscribed by law (citations omitted), the use of alcohol by college students is not so unusual or heinous by contemporary standards as to require special efforts by college administrators to stamp it out. Although the university reserved to itself the right to take disciplinary action for drinking on campus, this merely follows state laws. The same may be said of the provisions of the license agreement prohibiting alcoholic beverages. We do not believe they created a mandatory duty. (p. 21-22)

The Supreme Court of Colorado relied on *Bradshaw* and *Baldwin* in deciding *University of Denver v. Whitlock (1987). Whitlock* involved an intoxicated student who was injured after a trampoline accident in the front yard of a fraternity house leased from the university. The court examined both the relationship between the student and the University and the lease between the University and the fraternity to assess whether a special duty relationship existed upon which negligence could be based. Ruling that no special relationship existed, the court reasoned that there was nothing in the University's handbook that "...reflects an effort by the University to control the risk-taking decisions of its students in their private recreation" (p. 60) or anything in the lease that would provide a basis for establishing a special relationship between student and institution. In affirming the general principle that to impose such a duty would run contrary to the expectations held by the public for colleges and their students, the court stated, "Here, a conclusion that a special relationship existed between Whitlock and the University sufficient to warrant the imposition of liability for nonfeasance would directly contravene the competing social policy of fostering an educational environment of student autonomy and independence" (p. 62).

Other precedents have followed a similar reasoning, denying liability in instances of alcohol use by students. In *Campbell v. Board of Trustees, Wabash College (1986),* an Indiana appeals court pointed out that there could be circumstances in which a third party could be held liable under Indiana law for injuries sustained relating to alcohol consumption, but concluded that there was no basis for institutional liability absent evidence to suggest that the defendant college provided alcoholic beverages, knew that the student would be drinking that night, or that he would be driving an automobile after becoming intoxicated. The Court emphasized that college students should and will be treated as adults by the law, responsible for their own actions. In *Allen v. Rutgers State University of New Jersey (1987),* a New Jersey court affirmed a jury verdict in favor of university, holding that the university's maintenance of a policy prohibiting alcohol consumption did not result in responsibility for injuries sustained as the result of its violation, nor was the institution under any common law or statutory duty to protect the student from his own voluntary intoxication. In *Rothbard v. Colgate University (1997)*, a student who was injured when he fell out a window in his fraternity house following a party at which he consumed a large quantity of alcohol did not prevail in a suit alleging that the university assumed a special duty of care. The New York appeals court affirmed a grant of summary judgment to the institution, rejecting the contention that the university had assumed a duty to control the behavior of students because its student handbook prohibited underage drinking and provided disciplinary penalties for misconduct. Noting that "this is not a case where the university encouraged its students to participate in an activity and took affirmative steps to supervise the activity," (p. 148) the court majority emphasized that the terms of the handbook expressly prohibited the conduct involved and reasoned that the plaintiff was not a child in need of supervision, but an adult who must take responsibility for his behavior.

Courts have also rejected the contention that a special duty of care is owed by the institution to students below the legal age for purchase and consumption of alcohol. In *Booker v. Lehigh University (1992)*, for example, a federal court held that the institution's implementation of a social policy prohibiting alcohol consumption did not give rise to a special duty to control the actions of underage drinkers, and addressed the "adult" status of college students who may be underage for purposes of purchasing and consuming alcohol.

> At this point, we should explain the inter-relationship between plaintiff's adult, minor, and underage status. Plaintiff, being over the age of eighteen at the time of the incident, was an adult. For all facets of life, other than purchasing and consuming alcohol, she was an adult. As to purchasing and consuming alcohol, she would be considered by many to be a minor, i.e. she was legally incompetent to participate in such activities. We believe that a better description of this status is to call her "underage." There can be no question that she was competent, legally or other wise, to decide, inter alia, whether to break the law, e.g. whether to drink alcohol. She thus makes such a decision as an adult who is merely under the legal age for consuming alcohol. (p. 238)

Other courts have rejected an institutional duty of care in alcohol-related negligence cases even when the institution might have been regarded as having responsibilities for supervision and control of students. For example, in *Albano v. Colby College (1993)*, a student who was injured after becoming intoxicated while on a college sponsored trip to Puerto Rico alleged his tennis coach and the institution owed a special duty of care to protect him from the risks attendant to drinking alcohol. The federal court affirmed summary judgment for the institution, finding that the student voluntarily chose to consume alcohol, the coach and institution did not provide the alcohol, and the consumption of the alcohol was unrelated to the tennis team's training or instruction. The Supreme Court of Utah in *Beach v. University of Utah (1986)* determined that a special duty relationship did not exist in a case involving a biology student's fall on a field trip that rendered the student a quadriplegic. The student in Beach contended that the University breached its affirmative duty to supervise and protect her once she became intoxicated on the field trip and her disorientation led to a fall from a cliff. The court maintained that while whether an affirmative duty is owed to protect a student from his or her own actions is a manner that must be weighed in relation to the consequences for the parties and society at large. After reviewing the implications of asserting such a duty and the nature of the college-student relationship, the court concluded there was no special relationship:

> We do not believe that Beach should be viewed as fragile and in need of protection simply because she had the luxury of attending an institution of higher education. Not only are students such as Beach adults, but also law and society have increasingly come to recognize their status as such in the past decade or two. Nowhere is this truer than in the relations between the students and institutions of higher education. (p. 418)

While these cases clearly establish that appellate courts will not hold colleges and universities responsible for injuries sustained by students as a result of their illegal consumption of alcohol, changing social policies and awareness of the epidemic proportions of binge drinking may influence courts to reexamine institutional liability in this context. The basis for rejecting liability is the presumption that students are adults, and colleges and universities are not expected to act in loco parentis to prohibit this conduct. While courts have been uniform in rejecting institutional liability, there are ominous signs that institution might be held to a duty of care when they exercise a degree of supervision and control over student activities. For example, in *Coghlan v. Beta Theta Pi Fraternity (1999),* the Supreme Court of Iowa considered a case in which an underage student was furnished alcohol at several fraternity parties. The student became intoxicated and later fell from a fire escape at her sorority house, sustaining permanent injuries. Among her claims was an assertion that university employees were present at the parties as supervisors and observed her and other minors being served alcoholic beverages in violation of state law and university policies. The court found the allegations sufficient to support an inference that the university assumed a duty to exercise reasonable care to safeguard the underage plaintiff from the criminal acts of third parties (furnishing alcohol to minors). In remanding the case, the court ruled the lower court had erred in dismissing the claim, but reach no conclusion that an assumed duty existed.

Conclusions

Judges have recognized that once higher education administrators abandoned in loco parentis supervision of adult students and recognized the students' right to control and regulate their own lives; colleges and universities could no longer be charged with a special duty of care to supervise student activities. Clearly, the college or university is not an insurer of the safety of its students nor a policeman of student morality, nonetheless, it has a duty to regulate and supervise foreseeable dangerous activities occurring on its property, particularly when it elects to promote, sponsor, or control those activities.

In the context of negligent liability, the duty of care imposed on institutions is influenced by a range of factors, including judicial awareness of the degree of risk involved and the public policy that will result from a precedent extending or expanding liability. In the modern era, higher education institutions have become increasingly concerned with student welfare, in part because of societal awareness of activities like hazing and binge drinking on campus. Concurrently, institutions of higher education seek to attract students through the provision of a range of programs and services that include study abroad, community service and external internships. These and other extracurricular activities are often described in institutional brochures and guides as key elements in student development and socialization. Increasingly, higher education administrators emphasize an "ethic of caring" in the provision of services and the supervision of student activities.

Does an institutional commitment to an "ethic of caring" heighten the risk of negligent liability for student injuries that may arise in programs coordinated, sponsored, and supervised by the college or university? Recent case law suggests that the extension of liability based on a special duty relationship is possible, particularly in cases that involve third party assaults on students, hazing, and injuries in institutionally sponsored athletic activities. It is possible that public policy will influence judges to extend liability to other contexts as well, particularly cases involving student alcohol abuse.

As higher education administrators expand the range of services and programs offered to students in higher education institutions, they should be alert to the prospect that their involvement in a culture of caring will place them in the same context as coaches and instructors who exercise a degree of supervision over their charges that heightens the risk of negligent liability. Judges have made clear that it is possible to create a duty if one voluntarily undertakes to perform an act, and to find that a duty is breached when the act is performed in a negligent manner. Although judicial recognition of a special duty relationship has been limited, institutional administrators should begin to consider what affirmative steps might be required to reduce risks and adopt risk management and risk avoidance practices commensurate with the known dangers that can result from institutional programs.

Endnotes

Adams v. State, 620 N.Y.S.2d 80 (App.Div. 1994)
Albano v. Colby College, 822 F.Supp. 840 (D. Me. 1993)
Allen v. Rutgers State University of New Jersey, 216 N.J.Super. 189, 523 A.2d 262 (N.J. App. 1987)
Alton v. Texas A & M University, 168 F.3d 196 (5th Cir. 1999)
Baldwin v. Zoradi, 176 Cal. Rptr. 809 (Cal.App. 1981).
Beach v. University of Utah, 726 P.2D 413 (Utah 1986).
Bergeron v. Southeastern Louisiana University, 610 So.2d 986 (La. App. 1992)
Bloss v. University of Minnesota, 590 N.W.2d 661 (Minn.App. 1999)
Booker v. Lehigh University, 800 F.Supp. 234 (E.D.Pa.1992)
Bradshaw v. Rawlings, 612 F.2d 135 (3^{rd} Cir. 1979)
Brueckner v. Norwich University, 730 A.2d 1086 (Vt. 1999)
Campbell v. Board of Trustees, Wabash College, 495 N.E.2d 227; (Ind. App.1986)
Coghlan v. Beta Theta Pi Fraternity, 987 P.2d 300 (Idaho 1999)
Conroy v. Marquette University, 582 N.W.2d 126 (Wis.App. 1998)
Cutler v. Board of Regents of State of Florida, 459 So.2d 413 (Fla. App.1984)
Delbridge v. Maricopa County Community College, 893 P.2d 55 (Ariz.App. 1994)
Fu v. State, 643 N.W.2d 659 (Neb. 2002)
Furek v. University of Delaware, 594 A.2d 506 (Del.1991)
Garrett v. Northwest Mississippi Junior College, 674 S.2d 1 (Miss. 1996)
Hall v. Board of Supervisors, Southern University, 405 So. 2d 1125 (La.App.1981)
Harrington v. Louisiana State Board, 714 So.2d 845 (La.App. 1998)
Hartman v. Bethany College, 778 F.Supp. 286 (N.D.W.Va. 1991)
Henig v. Hofstra University, 160 A.D.2d 761, 553 N.Y.S.2d 479 (App.Div. 1990)
Howell v. Clavert, 1 P.3d 310 (Kan. 2000)

Houck v. University of Washington, 803 P.2d 47 (Wash.App. 1991)
Kleinknecht v. Gettysburg College, 989 F.2d 1360 (3rd Cir. 1993)
Klobuchar v. Purdue University, 553 N.E.2D 169 (Ind. App. 1990)
Knoll v. Board of Regents, 601 N.E.2d 757 (Neb. 1999)
Kyriazis v. University of West Virginia, 192 W.Va. 60, 450 S.E.2d 649 (W. Va. 1994)
McNeil v. Wagner College, 667 N.Y.S.2d 397 (App.Div. 1998)
Miller v. State, 466 N.Y.S.2d 436 (App.Div.1983)
Miller v. State, 478 N.Y.S.2d 829 (App.Div. 1984)
Moose v. Massachusetts Institute of Technology, 683 N.E.2d 706 (Mass. App. 1997)
Mullins v. Pine Manor College, 389 Mass. 47, 449 N.E.2d 331 (Mass.1983)
Nero v. Kansas State University, 861 P.2d 768 (Kan. 1993)
Newman v. Ohio State University, 62 Ohio Misc.2d 162, 594 N.E.2d 173 (Ct. Claims 1991)
Nisbet v. Bucher, 949 S.W.2d 111 (Mo.App. 1997)
Nova University v. Katz, 636 So. 2d 729 (Fla.App. 1993)
Nova Southeastern University v. Gross, 758 S.2d 86 (Fla. 2000)
Obiechina v. Colleges of the Seneca, 652 N.Y.S.2d 702 (Sup. Ct.1996)
Ochoa v. California State University, 85 Cal. Rptr.2d 768 (Cal.App. 1999)
Oja v. Grand Chapter of Theta Chi Fraternity, 667 N.Y.S.2d 650 (Sup. Ct. 1997)
Pensacola Junior College v. Montgomery, 539 So.2d 1153 (Fla.App. 1989)
Rabel v. Illinois Wesleyan University, 514 N.E.2d 552 (Ill.App. 1987)
Relyea v. State, 385 So.2d 1378 (Fla. App. 1980)
Rendine v. St.John's University, 735 N.Y.S.2d 173 (App.Div. 2001)
Rothbard v. Colgate University, 652 N.Y.S.2d 146 (Sup.Ct. 1997)
Ruchalski v. Schnectady County Community College, 656 N.Y.S.2d 784 (App.Div. 1997)
Schiffman v. Spring, 609 N.Y.S.2d 482 (App. Div. 1994)
Searles v. Trustees of St. Joseph's College, 695 A.2d 1206 (Me. 1997)
Sharkey v. Board of Regents, 615 N.W.2d 889 (Neb. 2000)
Smith v. Day and Norwich University, 148 Vt. 595, 538 A.2d 157 (Vt. 1987)
Trustees of Trinity College v. Ferris, 491 S.E.2d 909 (Ga.App. 1997)
University of Denver v. Whitlock, 829 F.2d 1340, (4th Cir. 1987)
Wallace v. Broyles, 961 W.S.2d 712 (Ark. 1998)

It's Not the Law– It's the Implementation that Matters

What 150 Front-Line Implementers Can Teach Lawyers, Legislators and School Leaders about Effective Strategies for Promoting School Inclusion

Chuck Vergon
Attorney & Professor
Youngstown State University

Lauren Broderick
Principal, Cardinal Local Schools
Middlefield, Ohio
@2002 Vergon / Broderick

Introduction

While legislators and lawyers are often engrossed in public policies and their intended outcomes, school leaders and the supposed beneficiaries of educational policies are acutely aware that policies are not self-implementing, and that even if implemented, they may or may not have the consequences policy makers intended. Although Education Law Association presentations often provide an analyses of the current state of the law, or a systematic review of cases suggesting a breakdown in compliance, we though it might be beneficial to provide a glimpse into the world of what works. Consequently, we invite you to explore along with us administrative strategies and organizational processes which promote policy implementation and the achievement of one of the most elusive national educational policy objectives ever enacted: the least restrictive environment mandate found in the Education of All Handicapped Children Act of 1975 and today's Individuals with Disabilities Education Act. What can lawyers, legislators, and school leaders, as well as members of the Academy learn from 150 teachers and principals on the front lines of LRE policy implementation? That is the question we propose to explore.

The LRE Mandate

Since the mid 1970s, national policy has mandated that students with disabilities be afforded a free and appropriate public education and that they be educated to the maximum extent appropriate with their non-disabled peers. The federal policy further stipulates that children may be removed from the regular educational environment "only when the nature or severity of the handicap is such that education in regular classes with the use of supplemental aids and services cannot be satisfactorily achieved" [30 USC 1412(5)(B)]. Yet, more than a quarter of a century later, the proportion of students with disabilities served in other than the regular classroom setting continues to be substantial. Of all children with disabilities, only 46 percent spend four-fifths of their time or more in a general education classroom. And while the LRE for any given student with a disability may not necessarily be the regular education classroom (Thomas & Rapport, 1999), the proportion served near full-time in the general education classroom varies dramatically from state to state, from a high of over 70 percent of all students with disabilities in five states to less than 30 percent of the students in five other states (Annual Reports to Congress on the Implementation of IDEA,2000 & McLeskey & Henry, 1999). Even among districts sharing a common state policy context, the proportion of students served in general classroom settings varies appreciably (State Educational Management Information System, 1998). These variations suggests, as students of policy sciences have long recognized, that national policy outcomes are largely a function of the manner in which a given policy is actually implemented at the lowest organizational level, in this instance at the local school district, school site and classroom level (Berman, 1978; Elmore, 1979-80; Pressman & Wildasky, 1973; and Weatherly & Lipsky, 1977). In short, implementation matters.

Implementation Matters

Policy research suggests that divergent policy outcomes may be largely attributable to differences in the manner in which the same policy is implemented in different organizational settings. In the estimates of some, differences in implementation regimes may explain as much as 80 percent of the variation in outcomes observed with respect to various types of policies. And while implementation decisions are not the sole prerogative of administrators, the education literature reminds us of the important role administrators can and must play if educational reform measures are to be successfully implemented (Berman & McLaughlin, 1987; Cuban, 1988, Fullan, 1991; Sage & Burrello, 1994). The educational literature is also equally clear that school administrators have not played a particularly active, or at least uniformly effective role in integrating regular and special education generally (Goodlad & Lovitt, 1993) or in promoting the adoption and implementation of inclusionary policies and practices at the school district and school site level in particular (e.g., Fisher, Sax and Grove, 2000; Richardson & Others, 1994; Sirotnik & Kimball, 1994; ; and Woley & Others, 1995). Some limited research and case study accounts are beginning to emerge, however, suggesting some of the types of strategies that local leaders might effectively employ to promote inclusion in their schools (e.g., Baines & Masterson, 1994; Van Dyke, Stallings & Colley, 1995; and Wisniewski & Alper, 1994). Other promising strategies can be gleaned from the broader social science literature on social program implementation (e.g., Bardach, 1977; Berman, 1978; Elmore, 1986; Mazmanian and Sabatier, 1989; McLaughlin, 1987; Pressman and Wildasky, 1973; Van Horn and Van meter, and Weatherly and Lipsky, 1977), as well as from the general literature on organizational leadership (e.g., Kouzes & Posner, 1987; Peters & Waterman, 1982; Sergiovnni, 1994, 1999; and Wheatley, 1992).

The Study Questions

Drawing on this literature regarding leadership and effective policy implementation strategies, we surveyed 153 regular and special education teachers and building level administrators on the front lines of LRE or inclusion policy implementation in 60 school districts spanning two mid-western states. We explored several questions:

1. How important are five constellations of organizational measures and each of some 40+ distinct administrative strategies in promoting the adoption and successful implementation of inclusion initiatives in local school settings?

2. To what extent are each of the administrative strategies identified as important by teachers and administrators actually being implemented in their school settings? and,

3. What relationships appear to exist between relative progress in achieving regular classroom placements for children with disabilities and certain organizational and leadership characteristics suggested in the literature as important variables affecting the adoption of policies and the implementation of innovations in complex social organizations such as schools? In particular, how do local leadership and the administrative strategies employed appear to affect a school's inclusion status?

Critical Lessons from the Front-Lines Where Inclusion is Implemented

We limit our conclusions to several general observations which we think have particular relevance for school leaders charged with providing leadership in creating and sustaining inclusive schools, as well as for lawyers and legislators interested in promoting compliance and attaining higher levels of regular classroom placements for children with disabilities. The general lessons we have gleaned from this research, include:

1. Front-line implementers assign substantial importance to each of five major constellations of organizational measures (e.g., ones focusing on policy & process, program features, personnel development and deployment, resource marshaling and allocation, and organizational rewards and incentive systems) suggesting the importance of a multifaceted approach to promote effective inclusion.

2. A large proportion of the 42 distinct administrative strategies studied were rated as either very or extremely important in promoting regular classroom inclusion. This suggests not only that a variety of strategies available to administrators to promote inclusion, but that the implementation of an appreciable number may be necessary to achieve effective inclusion. Administrators and teachers tended to express a surprising level of agreement about the importance of a wide range of strategies.

3. A relatively small proportion of the strategies, including those characterized as very or even extremely important by front line implementers, were actually implemented in an appreciable number of schools where the respondents worked.

4. Perceptions of whether various strategies were implemented in school settings varied significantly and dramatically depending on the role group to which the respondents belonged. Administrators were more likely to report a strategy as implemented than were either special or regular education teachers. This pattern persisted for 40 of the 42 strategies evaluated.

5. Whether or not administrative strategies were implemented had a bearing on the inclusion status of the buildings studied and at which of four points on an Inclusion Continuum they fell.

6. The implementation of certain administrative strategies tended to be significantly associated with schools that were characterized as having achieved higher levels of regular classroom inclusion than other schools. The implementation of 20 strategies tended to be associated with high inclusion sites at a statistically significant level. These strategies are ones that highly recommend themselves to school leaders, lawyers and legislators interested in moving schools along the continuum of inclusiveness from Mainstreaming to Partial Inclusion to LRE and ultimately, perhaps, to Full Inclusion status.

7. Most of the strategies that were perceived as important, and which were associated with higher levels of actual inclusion in school settings, were ones that involved changes in administrative behavior or processes, rather than the commitment of substantial levels of new fiscal resources.

8. Strategies differentially implemented in schools characterized as LRE or Full Inclusion included, for instance: articulating a clear organizational vision; developing a common educational rationale for inclusion; and communicating clear expectations of shared staff responsibility for the education of all students.

9. Administrators in high inclusion schools were also reported to more regularly engage in assessment and problem solving-related activities, including visiting classrooms to observe and elicit staff feedback and in discussing inclusion progress and problems at regular staff meetings.

10. In terms of programmatic emphasis, these administrators were especially more likely to provide teachers guidance regarding student assessment practices; involve regular education staff in IEPs; and promote the incorporation of behavioral objectives in the student IEPs.

11. Finally, and especially significantly, rather than focusing on the highly individualized nature of service provision associated with ensuring a free and appropriate education to students with disabilities, effective administrators sough to link the satisfaction of these individual needs to broader organizational goals and processes for achieving them. Instead of managing dozens of individualized educational plans, they invoked organizational processes in fashioning building level implementation plans and regimes designed to overcome common barriers to successful inclusion and to coordinate the involvement of other stakeholders and front-line implementers in an on-going process of assessing building level progress and making adjustments as necessary to support staff in their efforts to educate students with disabilities in the least restrictive environment.

Conclusion

This research serves to underscore that implementation matters in our continuing pursuit of the elusive national policy goal of educating students with disabilities in the least restrictive environment. It also serves to identify some of the types of organizational measures and administrative strategies that tend to increase the probability that inclusion initiatives will be implemented, and that the implementation will lead to the outcomes intended. As such, the research has implication for legislators seeking to adopt more implementation-attentive policy regimes; to lawyers interested in crafting and advocating for more effective remedial plans; and to local leaders desiring both to achieve greater inclusion for its education advantages and to keep legislators and lawyers from imposing ever more stringent and coercive LRE policies. Finally, the research is a reminder to members of the Academy to review their preparation programs to ensure that the prospective leaders they turn out possess the knowledge, skills and values needed to translate new special education policies into local organizational practices. This may itself require reform in higher education programs, including not only new content and methods of instruction, but also new levels of inter-professional collaboration with teacher and special education faculty, changes not dissimilar to the types of changes being compelled in k-12 educational settings by the introduction of inclusion.

Comments or suggestions on this manuscript: cbvergon@cc.ysu.edu or 330. 742.1574.

References

Baines, L. and Baines, C. with Masterson, C. (1994). Mainstreaming: One school's reality. Phi Delta Kappan 76(1) (September), 39-64.

Baradach, E. (1977). The implementation game. Cambridge: MIT Press.

Berman, P. (1978). The study of macro- and mico- implementation. Public Policy, 26(2), 157-184.

Berman, P. and McLaughlin, M. (1978). Federal programs supporting educational change: Implementing and sustaining innovations. Santa Monica: Rand Corp.

Cuban, L. (1988). The managerial imperative and the practice of leadership in schools. Albany: SUNY Press.

Danielson, L.C. and Bellamy, G.T. (1989). State variation in placement of children with handicaps in segregated environments. Exceptional Children, 55, 448-455.

Elmore, R. Organizational models of social program implementation. Public policy, 1978, 26, 185-228.

Elmore, R. (1979-80). Backward mapping: Implementation research and policy decisions. Political Science Quarterly, 94(4), 601-616.

Elmore, R. and McLaughlin, M. (1988). Steady work: Policy, practice and reform of American eduction. Santa Monica: Rand Corp.

Fisher, D., Sax, C. and Grove, K. (2000). The resilience of changes promoting inclusiveness in an elementary urban school. Elementary School Journal, 100(3), 213-227.

Fullan, M. and Stiegelbauser, S. (1991). The new meaning of educational change. New York: Teachers College Press.

Katsiyannis, A., Conderman, G. and Franks, D. (1995). State practices on inclusion: A national review. Remedial and Special Education, 16(5), 279-287.

Knapp, M.S., Stearns, M.S., Turnbull, B.J., David, J.L. and Peterson, S.M. (1991). Cumulative effects of federal education policies at the local level. In A. Odden, Policy Implementation, 105-123. Albany: SUNY Press.

Kouzes, J. and Posner, B. (1987). The leadership challenge: How to get extraordinary things done in organizations. San Fransico: Jossey-Bass.

McLaughlin, M. (1987). Learning from experience: Lessons from policy implementation. Educational Evaluation and Policy Analysis, 9(2), 171-178.

McLeskey, J. and Henry, D. (1999). Inclusion: What progress is being made across the states? Teaching Exceptional Children 31(5)(May/June), 56-62.

Morra, L. G. (1994). Special education reform: Districts grapple with inclusion programs. Testimony before Subcommittee on Select Education and Civil Rights, Committee on Education and Labor, House of Representatives. (Washington,D.C.: GAO). [ED 372552].

Osborne, A.G. (1994). The IDEA's least restrictive environment mandate. Education Law Reporter, 88 (March 24), 351-360.

Peters, T. and Waterman, R. (1982). In search of excellence. N.Y.: Harper & Row.

Pressman, J. & A. Wildavsky. Implementation. Berkeley: University of California Press, 1973.

Raison, J., Hanson, L.A., Hall, C. and Reynolds, M. C. (1995). [Inclusion] Another school's reality. Phi Delta Kappan 76(6) (February), 480-482.

Richardson, N. and others. (1994). A System Apart: A Study of the Implementation of the Least Restrictive Environment Provisions of IDEA in Massachusetts and Illinois. (Newton, MA: Education Development Center). [ED 375561].

Sabatier, P. & D. Mazmanian. (1979). The conditions of effective implementation. Policy analysis, 1979, 5, 481-504.

Sabatier, P. & D. Mazmanian. (1989). Policy implementation. Landham: University Press of America.

Sage, D. and Burrello, L. (1994). Leadership in educational reform: An administrator's guide to change in special education. Baltimore: Brookes.

Sergiovanni, F. J. (1996). Leadership for the Schoolhouse. San Francisco, CA: Jossey Bass.

Sirotnik, K. and Kimball, K. (1994). The unspecial place of special education in programs that prepare school administrators. Journal of School Leadership, 4(6), 598-630.

Thomas, S. and Rapport, M. (1999). Least restrictive environment: Understanding the direction of the courts. Journal of Special Education, 30(2), 66-78.

U.S. News & World Report (1993). Separate and unequal. U.S. News & World Report (December), 46-60.

Van Dyke, R., Stallings, M.A. and Colley, K. (1995). How to build an inclusive school community: A success story. Phi Delta Kappan 76(6) (February), 475-479

Van Horn, C. & D. Van Meter. (1977). The implementation of intergovernmental policy. Policy studies annual review, 1977, 1, 97-120.

Weatherley, R. and Lipsky, M. (1977). Street-level bureaucrats and institutional innovation: Implementing special education reform. Harvard Educational Review, 47(2), 171-192.

Wheatley, Margaret J. Leadership and the new science: Learning about organization from an orderly universe. 1st ed. San Francisco: Berrett-Koehler Publishers, 1992.

Wisniewski, L. and Alper, S. (1994). Including students with severe disabilitiesin general education settings: Guidelines for change. Remedial and Special Education, 15(10, 4-13.

Wolery, M., Werts, M., Lisowski, L., Caldwell, N. and Snyder, E. (1995). Expereinced teachers' perceptions of resources and supports for inclusion. Education and Training in Mental Retardation and Disabilities, 30., 15-26.

Zigmond, N., Jenkins, J., Fuchs, L.S., Deno, S., Fuchs, D., Baker, J.N., Jenkins, L. and Couthino, M. (1995). Special education in restructured schools: Findings from three multi-year studies. Phi Delta Kappan, 76(7) (March), 531-540.

The Balance Between Student Drug Testing and Fourth Amendment Rights in Response to *Board of Education v. Earls*

Stacey L. Edmonson
Sam Houston State University

Paper presented at the Education Law Association's 48th Annual Conference
New Orleans, Louisiana
November 14-16, 2002

The Balance Between Student Drug Testing and Fourth Amendment Rights in Response to *Board of Education v. Earls*

Since 1791, the Fourth Amendment to the United States Constitution has protected all persons from unreasonable searches and seizures; specifically the Constitution states that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."[1]. Recently, however, this protection has come under scrutiny in one very important context – public schools. Does random, suspicionless drug testing of students constitute an unreasonable search? The Supreme Court has seemingly answered this question with its decision in *Board of Education v. Earls.* [2]

In 1995, the United States Supreme Court rendered its decision in *Vernonia School District 47J v. Acton,*[3] holding that a school district's random suspicionless drug testing of student athletes as a condition for participation in interscholastic athletics did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures. In this particular case, however, the Court noted specific features including student athletes decreased expectations of privacy, the relative unobtrusiveness of the search procedures, and the seriousness of the need met by this search.[4] Regardless of the procedures, however, this case clearly lowered schools' previous legal search standard[5] of "reasonable suspicion," set forth by *New Jersey v. T.L.O*[6] in 1985.[7]

In light of the *Acton* decision and in response to statistics indicating that drug use among students is rising[8], a number of school districts nationwide implemented mandatory drug testing for students.[9] A 2001 study of the student drug-testing policies of Texas school districts revealed that 169 school districts currently engage in drug testing of at least one group of students, usually student athletes or all students engaged in extra-curricular activities. Only two of these districts' policies had been challenged in court.

---

[1] Fourth amendment to the United States Constitution, 1791.

[2] 122 S. Ct. 2559, 153 L. Ed. 2d 735

[3] 515 U.S. 646, 115 S. Ct. 2386, 132 L. Ed. 2d 564 (1995).

[4] Id.

[5] J.A. Stefkovich & G.M. O'Brien, *Students' fourth amendment rights and school safety: An urban perspective*, 29 Education and Urban Society 149 (1997).

[6] 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985).

[7] As a result, two appellate courts have upheld random, suspicionless drug testing of students who participate in extracurricular activities not limited to athletics. *See Joy v. Penn-Harris-Madison School Corporation*, 212 F.3d 1052 (7th Cir. 2000) (upholding random drug and alcohol testing of students who participate in extracurricular activities and who drive to and from school; invalidating nicotine testing for students who drive to and from school); *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), *vacated as moot*, 1999 U.S. App. LEXIS 13289 (8th Cir. (Ark.)); *Todd v. Rush County Schools*, 133 F.3d 984 (7th Cir. 1998), *rehearing with suggestion for rehearing en banc denied*, 139 F.3d 571 (7th Cir. 1998), *cert. denied*, 1998 U.S. LEXIS 4938.

[8] N. Flatt-Moore, *Public schools and urinalysis: Assessing the validity of Indiana Public Schools' student drug testing policies after Vernonia.* 1998 BYU Educ. & L. J. 239.

[9] D. Hawkins, *Trial by vial,* 126 U.S. News and World Report 21(May 31, 1999).

The policies of both Tulia Independent School District[10] and Lockney Independent School District[11] were struck down as violating students' Fourth Amendment rights.

In *Gardner v. Tulia*, the Tulia Independent School District mandated in 1999 a policy that required drug testing of all students in grades seven through twelve who participated in any extra-curricular activities. In Tulia, this population included approximately 80% of the total student body. Tulia implemented this policy using the Supreme Court's *Vernonia* decision for guidance. However, the drug culture among students in *Vernonia* had caused discipline problems of "epidemic proportions." [12] Tulia had no evidence of serious or widespread student drug use at the time the policy was adopted. Furthermore, the district had no data to support any notion that students participating in extra-curricular activities were referred for drug-related disciplinary action. In December 2000, the United States District Court ruled that Tulia's mandatory student drug-testing policy for extra-curricular activity participants was violative of students' fourth amendment protection against unreasonable searches and seizures.

The small panhandle town of Lockney, Texas, took its student drug testing policy even further. The Lockney policy required drug testing of all students, each conducted with parental consent. Students who refused to test or who did not obtain parental consent were treated as though they had a positive test result; students in these circumstances were suspended from participation in all extra-curricular activities for 21 days and removal to in-school suspension for at least three days. When challenged by a single student's family, federal district court overturned an earlier decision and ruled that the Lockney policy violated students' fourth amendment rights[13]. The Tannahill family was the lone family in the district who refused to consent to the testing for their son, who was a junior high student, despite the fact that Lockney's reported student drug use was actually lower than other students statewide. In March 2001, the United States District Court ruled that Lockney's policy of requiring urinalysis of all secondary students was unconstitutional according to the fourth amendment.

In addition to *Vernonia v. Acton*, two additional cases are fundamental in understanding the Tulia and Lockney decisions. The Fifth Circuit's decision in *Aubrey v. School Board of Lafayette Parish* [14] allowed mandatory employee drug testing without requiring evidence of a drug problem; the drug testing policy was justified due to the safety concerns inherit with the employees' duties. In *Brooks v. East Chambers Consolidated Independent School District,* [15]the Fifth Circuit ruled that East Chambers' policy of mandatory random urinalysis of students in grades seven through twelve who participated in extra-curricular activities was a violation of students' fourth amendment protections. The facts of the East Chambers case closely resembled those of the Tulia case.

---

[10] *Gardner v. Tulia Independent School District*, 2000 U.S. Dist. LEXIS 20253 (W.D. Tex.).
[11] *Tannahill v. Lockney ISD*, 133 F.Supp.2d 919 (W.D. Tex. 2001).
[12] *Vernonia School District 47J v. Acton*, infra, 515 U.S. at 648-50, 115 S.Ct. at 2388-89
[13] *Tannahill v. Lockney ISD*, 133 F.Supp.2d 919; 2001 U.S. Dist. LEXIS 2251
[14] 92F.3d 316, 318 (5th Cir. 1996)
[15] 730 F.Supp.759 (S.D. Tex. 1989), affirmed, 930 F.2d 915 (5th Cir. 1991)

In direct contrast to these decisions, however, the Supreme Court ruled on the issue of random suspicionless drug testing of students in June, 2002, with its decision in *Board of Education v. Earls*,[16] a 10th Circuit case from Oklahoma in which drug testing of students in any extra-curricular activities was determined to be unconstitutional. In a perhaps surprising 5 – 4 decision, the Supreme Court upheld the school district's policy of random suspicionless drug testing of all students who participated in any extra curricular activities, not just athletics. Using *Vernonia* as a guideline, the 10th Circuit in *Earls* held that "before imposing a suspicionless drug testing program a school must demonstrate some identifiable drug abuse problem among a sufficient number of those to be tested, such that testing that group will actually redress its drug problem." In overturning the 10th Circuit's decision, the Supreme Court's majority in *Earls* stated that "a demonstrated drug abuse problem is not always necessary to the validity of a testing regime." This language is directly contradictory to that of previous drug testing cases, particularly *Tulia* and *East Chambers*. Furthermore, the Court defends this stance by adding that "the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy." Thus, based on the *Earls* decision, random suspicionless drug testing of students does not violate the Fourth Amendment's protection from unreasonable searches and seizures.

This paper offers the comprehensive results from research analyzing the current student drug-testing policies of all 1056 Texas public school districts. A 2001 study of all Texas school districts found that 169 districts had current student drug testing policies. In response to the Supreme Court's decision in *Earls* in June, a follow up study was conducted of respondent districts to see if they planned to change their district policy in light of the Court's new ruling. Did these districts change their policies in response to the *Earls* decision? Why or why not? What types of changes (if any) were made? What are the implications for future policy-making among school districts?

Methodology

The original study of student drug testing policies in Texas began in 2001. According to the Texas Education Agency[17], at that time there were 1056 independent school districts in the state of Texas. This figure does not include charter school districts or common school districts. In February 2001, one survey, with a postage paid return envelope, was mailed to the superintendent of each public independent school district in Texas. With the availability of resources through the Texas Education Agency, every public school district in Texas was included in this study.

The survey instrument used in this study was developed with the assistance of an expert panel of educational leadership professors trained in school law. Field testing was conducted to establish content and construct validity. Specifically, this survey sought the following data:

1. Does your school district currently drug test students?
2. Is this student drug testing restricted to certain populations of students?
3. How long has this policy been in place?

---

[16] 122 S. Ct. 509; 151 L. Ed. 2d 418 (2001).
[17] Texas Education Agency, Public School Directory (2000).

4. To your knowledge, has this policy been challenged?
5. If so, in what manner was the policy challenged?
6. If so, what was the outcome of this challenge?
7. If your district does not have a student drug testing policy, do you anticipate that your district will implement one in the future? Why or why not?

Additionally, the survey requested a copy of school board policy FNF, legal and local, which addresses student drug testing issues. These data were collected beginning in February 2001. A second mailing of the survey was conducted in April 2001, to request responses from those districts who had not yet returned their surveys. All responses were entered in a complete database for analysis.

With the Supreme Court's far-reaching decision regarding student drug testing policies in *Board of Education v. Earls* at the end of June 2002, a continuation of this research was deemed appropriate. Along with a cover letter explaining the research study and the *Earls* decision, a survey and self addressed postage paid envelope were sent to all districts that had responded to the original study in 2001; thus, 827 surveys were mailed. For districts that had originally responded that they did have a student drug testing policy, the following questions were asked:

1. Do you plan any changes to this policy in light of the Supreme Court's decision in *Earls*?
2. If yes, how will this change take place?
3. Please explain any other type of changes you foresee in your district's student drug testing policy.

For districts that had responded in the first survey that they did not engage in student drug testing, a slightly different survey was distributed, using the following questions:

1. Do you plan to implement a student drug testing policy in light of the Supreme Court's decision in *Earls?*
2. If yes, what population of students will be subject to testing?
3. Please explain any other types of changes you foresee in the district's student drug testing policy.

Both surveys also asked for the size and location of the responding district, along with any additional comments.

Results/Conclusions

For the original survey, 827 of the 1056 public school districts in Texas returned their surveys; thus, the response rate for the survey was 78.3%. Of these responses, 658 (20.4%) superintendents indicated that their school district did not currently implement a student drug-testing policy; 169 (79.5%) respondent school districts did implement some type of student drug-testing policy. These results are displayed in Table 1.

Table 1.

Student drug-testing policies in Texas school districts

N=827

Policy in place	Number of districts	Percentage
Yes	169	20.4
No	658	79.5

A look at the responses to the remaining original 2001 survey questions presented a number of interesting findings. Students involved in extra-curricular activities made up the most-often tested population, the type of policy just recently upheld by *Earls*, followed by student athletes, the precedent set with *Vernonia*. Drug-testing policies for these student populations comprise more than three-fourths of all the public school drug-testing policies in Texas. All students are drug-tested in 28 of respondent districts, the same type of policy that was recently thrown out in *Lockney*. Of these 28 districts implementing mandatory testing, 13 happen to be state-supported group homes or correctional facilities, including Windham School District, the Texas prison education system. Mandatory drug testing of students in these correctional facilities is legal, but clearly the policies for testing all students currently implemented in the remaining 15 districts are somewhat suspect in light of the *Lockney* ruling. Three districts indicated a student testing population of "other," which in all three cases referred to students who drive motor vehicles to or from school. Nine districts indicated that their student drug-testing policies are completely voluntary for students. The response data for these questions are displayed in Table 2.

Table 2.

Student populations included in drug-testing policies.

N=169

Student population	Number of districts	Percentage
Student athletes	53	31.4
Students in extra-curricular activities	76	45.0
All students	28	16.6
Other	3	1.8
Voluntary testing only	9	5.3

The third question in the original 2001 survey asked districts who did have student drug-testing policies how long that policy had been in place. Available responses included less than one year, one to five years, five to ten years, and more than ten years. Drug testing polices had been in place less than one year for 22 of the 169 districts, or 13% of respondents. The majority of policies had been in place for one to five years, which comprised 71.6% of the results, or 121 districts. Nine districts, or 5.3%, have policies that have been in place for five to ten years. Worth noting is the fact that of the 16 districts with policies over 10 years old, 12 of these schools are state-supported correctional facilities or homes. One district failed to indicate how long their policy had been in place. The results from this survey question are displayed in Table 3.

Table 3

Years of implementation of drug-testing policies.

N=169

Number of years	Number of districts	Percentage
Less than one	22	13.0
One to five	121	71.6
Five to ten	9	5.39
More than ten	16	9.5
No response	1	

Perhaps the most interesting question on the survey was question four, which asked districts that have a student drug-testing policy if said policy had ever been challenged. A few districts responded that parents had questioned the policy or even taken complaints to the school board, but only four districts out of 169 positive responses indicated that their policy had been legally challenged. These four districts represented a mere 2.4% of drug testing policies in Texas schools that had been challenged in the courts. Of these four districts, two failed to offer any explanation of their challenge. The two districts who did elaborate on their challenge were, not surprisingly, Lockney Independent School District and Tulia Independent School District. At the time of the response, the Lockney ruling had not yet been issued. The Tulia response indicated that their policy had been overturned by the district court and was being appealed to the Fifth Circuit. Copies of both schools' current policies were collected. Table 4 displays the data gathered for question 4.

Table 4.

Student drug-testing policies.that have been challenged

N=169

Policy challenged	Number of districts	Percentage
Yes	4	2.4
No	165	97.6

The results of the follow up survey conducted after the *Earls* decision also yielded interesting results. Of the 658 surveys mailed for districts that had previously indicated having no student drug testing policy, 264 surveys were returned, thus yielding a 40.1% return rate. Of these 264 districts, only 35 stated that they planned to implement a student drug testing policy in the immediate future. Table 5 illustrates this finding. Interestingly enough, when asked in the original 2001 survey if their district had any plans for possibly implementing a policy in the future, 69 of the 658 responding districts at that time had indicated an interest in doing so. Thus, 10.5% of responding districts indicated plans to implement a student drug testing policy prior to the *Earls* decision, whereas 13.3% of responding districts indicated plans to implement such a policy after *Earls*.

Table 5.

Student drug-testing policies planned for implementation after *Earls*.

N=264

New policy planned or in place	Number of districts	Percentage
Yes	35	13.3
No	229	86.7

Of the 35 districts that indicated an intent to implement student drug testing after the *Earls* decision, 24 districts stated that the new policy would test all students in extra curricular activities. Five districts planned to test student athletes only, and two districts stated an intent to randomly drug test all students. Three positive responses did not indicate the student population to be tested, and one response stated that students involved in athletics, band, drill team, and cheerleading would be tested (but not other extra curricular activities). Thus, most of the policies enacted after the Supreme Court's decision did indeed follow the precedent recently set. These data appear in Table 6.

Table 6.

Student populations included in new (post-*Earls*) drug-testing policies.

N=35

Student population	Number of districts	Percentage
Student athletes	5	14.3
Students in extra-curricular activities	24	68.6
All students	2	5.7
Other	1	2.9
Voluntary testing only	0	0.0

The data collected for districts that already had a student drug testing policy in place prior to *Earls* were also interesting. In these surveys, districts were asked if they planned to change their policies in light of the Supreme Court's decision. Because originally almost one-third of districts who had student drug testing policies tested only student athletes – in line with the Supreme Court's holding in *Vernonia* – the researcher was interested to see if these districts might follow the Supreme Court's ruling to expand their policies to include all students involved in extra curricular activities, as allowed by the *Earls* decision. The original 2001 survey generated 169 responses from districts that had student drug testing policies at that time; of those districts, 13 were state schools (such as juvenile justice programs) that had legal jurisdiction beyond that of typical public schools and thus drug tested all their students on a regular basis. Based on this fact, these 13 schools were not included in the follow up survey. Thus, 156 follow up surveys were mailed to districts that had previously indicated use of a student drug testing policy. From this mailing, 78 survey responses were returned, for a 50% return rate. Of these 78 responses, 59 districts indicated no intent to modify or change their policy in response to the *Earls* decision. Nineteen districts did indicate plans to change their policy in some manner. Table 7 illustrates these findings.

Table 7.

Student drug-testing policy changes made after *Earls*.

N=78

Changes to policy planned or in place	Number of districts	Percentage
Yes	19	24.3
No	59	75.6

Of the 19 districts that indicated an intent to modify their student drug testing policies after the *Earls* decision, 12 districts stated that the policy would be modified to test all students in extra curricular activities. Three districts planned to test student athletes only, and no districts stated an intent to randomly drug test all students. One positive response did not indicate the student population to be tested, and one response stated that all drug testing policies would henceforth be voluntary. Perhaps most interestingly, two districts that had active drug testing policies a year ago had chosen to eliminate these policies completely for the upcoming school year. As the date in Table 8 indicate, most of the policy changes made after the Supreme Court's decision mirrored the policy upheld in *Earls*.

Table 8.

Student populations included in modified (post-*Earls*) drug-testing policies.

N=19

Student population	Number of districts	Percentage
Student athletes	3	15.8
Students in extra-curricular activities	12	63.2
All students	0	0.0
Voluntary testing only	1	5.3
Policy eliminated/discontinued	2	10.5

Individual responses generated by the surveys also yielded a variety of unique responses not specifically asked for by the survey questions. For example, one district indicated that its drug testing procedures were highly unique because they tested using hair samples rather than urinalysis. Given that the obtrusiveness of the search procedures was a critical component of *Vernonia* and was also addressed as important in *Earls*, this alternative approach to urinalysis is quite interesting. One district stated that there was no drug use in its particular area, and several districts indicated that they currently saw little need for testing or that they had "little Board interest." The cost of student drug testing was mentioned by one district as a problem for implementing a student drug testing policy. A large number of districts did indicate that they were carefully researching the possibility of a future student drug testing policy.

Data were also collected concerning the size and geographic location of each responding district. These data will be analyzed for discovering state trends, such as whether most current policies are found in small or large districts or if a particular area of the state supports stricter policies than do other areas.

Whereas the Supreme Court's decision in *Vernonia v. Acton* maintained narrow guidelines by which the student drug testing policy in question was constitutional, the Court's recent decision in *Board of Education v. Earls* greatly expanded school districts' abilities to implement random suspicionless drug testing of students. The Earls decision conflicted with two recent federal district court decisions in Texas that had clearly demonstrated the limitations faced by drug testing districts; *Gardner v. Tulia* struck down a district's policy of testing all students in extra-curricular activities, and *Tannahill v. Lockney* struck down a policy of testing every child in the school. Thus, prior to *Earls* the courts appeared to be indicating that a school district's duty to protect students from physical harm did not extend to the point of limiting these students' constitutional rights. Are student rights diminishing, or are the rights of schools simply becoming more explicit?

Along with the Supreme Court's decision come a number of implications for district level policy. Districts must ensure that they are implementing policies that maintain the confidentiality of student results to the maximum extent possible, that do not involve law enforcement personnel or disciplinary procedures, and that offer testing procedures that are reasonably unobtrusive. The previous need to document a problem with student drug use is no longer necessary, although districts should continue to track this information in order to support their testing policy and measure its effectiveness. An examination of the trend in Texas school districts to continue expanding student drug testing policies may indicate a movement taking place nationwide. Thus, the balance between student drug testing and fourth amendment rights continues to deserve close examination.

The Effectiveness of Legality of Random Drug Testing Policies

By

Joseph R. McKinney, J.D., Ed.D.
Chair and Professor
Department of Educational Leadership, Ball State University
Adjunct Professor of Law, Indiana University-Bloomington School of Law

The Effectiveness and Legality of Random Drug Testing Policies

Introduction

Despite some recent progress in combating adolescent drug and alcohol use among students, research indicates that drug and alcohol use remain chronic problems among the nation's teenagers. American schools are involved in a number of education and prevention programs aimed at reducing drug and alcohol use. Random drug testing of students in public schools is one drug prevention/deterrence program that schools have employed across the country. However, little or no research has been conducted on whether random drug testing policies are effective. Does the implementation of a random drug testing program result in a reduction of drug and alcohol use among high school students?

The purpose of this study was to examine the effectiveness of a mandatory, random, suspicionless drug testing policy. The study also examines the constitutionally based case law that is the backdrop to random drug testing policies. Traditional legal research and survey research were employed in this study.

Legal Background

Random drug testing policies are controversial and have been the subject of numerous lawsuits being brought by parents and students. Courts have recognized that drug use by school students is a compelling national concern and that deterring such use is a matter of substantial importance. Courts have acknowledged that student drug and alcohol use affects not only the user himself, but also all members of the student body and faculty, and disrupts the educational process. The U.S. Supreme Court ruled that testing of student athletes is constitutional. (Veronia School District 47J v. Acton, 515 U.S.646 (1995).

Recently in a 5-4 decision the U.S. Supreme Court held that a mandatory random drug testing program for all students participating in extracurricular activities was a reasonably effective means of meeting the school district's legitimate concerns regarding detecting, determining and preventing illegal drug use by students. (Board of Education of Independent School District No. 92 of Pottawatomie County, Oklahoma v. Earls, 122 S.Ct. 2559 (2002).

The Indiana Court of Appeals ruled that random drug testing policies for students were unconstitutional under the Indiana Constitution in August 2000. (Linke v. Northwestern Sch. Corp., 734 N.E. 2d 252 (Ind. Ct. App. 2000). Drug testing policies were challenged by the Indiana Civil Liberties Union. All Indiana schools halted their random drug testing programs after the decision and waited for a decision by the Indiana Supreme Court. The Indiana Supreme reversed the appellate court in the summer of 2002 and school districts in Indiana have reinstated their programs or are considering implementing random drug testing programs.

Methodology

A list of high schools with random drug testing policies was created. Ninety-four high schools were identified as possibly implementing random drug testing policies. The survey instrument was the subject of a pilot study with high school and assistant high school principals.

83 high school principals responded to the survey. Twelve principals indicated that they did not have a drug testing policy before the Indiana Appellate Court decision. 71 high schools did have a policy. Principals were asked to compare drug and alcohol activity during the 1999-2000 school year when drug testing policies were in effect with the 2000-2001 school year when schools were not allowed to continue with their random drug testing policies.

Results

1. 85% of the high school principals reported an increase in either drug usage or alcohol usage among their students after the drug testing program was stopped, compared to the 1999-00 school year (when they had a drug testing plan implemented).
   80% reported an increase in illicit drug usage during the 2000-01 school year compared to the previous year.
   59% reported an increase in alcohol usage during the 2000-01 school year compared to the previous year.

2. 83% reported their answers concerning the increase in drug and alcohol usage was based on information received directly from students.
   79% said their answers were based on information from teachers and staff.
   59% said information came from law enforcement.
   23% said information came from formal surveys of students at the school.

3. 78% of the principals reported that there was an increase (compared to the 1999-00 year) in the number of students who came forward and told them that drug and alcohol usage was on the rise since the drug-testing program was stopped.

4. Principals reported that last year 352 students were either suspended or expelled for drug or alcohol related incidents during the 1999-2000 school year.
   Principals reported that during the 2000-2001 year (at the time they returned the survey, May 2001) without the drug-testing program that there were 518 drug or alcohol related suspensions/expulsions.

(This number actually increased according to final IDOE report). A t-test was performed and the results indicate that there was a statistically significant increase from last year to this year (t=2.9,df58, p<, 01).

5. 55% of the principals reported that coaches either indicated to them that they had received information that student athletes were involved in more incidents of drinking during the 1999-00 year without the drug-testing program.
57% reported the same regarding the use of drugs by student athletes.
97% of the drug testing programs included student athletes.

6. 89% of the principals believe that the drug-testing program undermines the effects of peer pressure by providing a legitimate reason to refuse to use illegal drugs and alcohol.

7. There was no statistically significant difference in the increase in drug and alcohol usage based on the size or location of the high school. In other words, all high schools, regardless of size or location, were impacted by the increase.

8. There was a moderate correlation between the largest percentage increases in drug and alcohol related expulsions and suspensions and large rural schools.

Importance of the Study

Random drug testing policies appear to provide a strong tool for schools to use in the battle to reduce alcohol and drug usage among teens. Yet, there are several legal, financial, educational, and privacy issues that must be considered by schools that want to implement or continue random drug testing policies. While the legal debate will continue over drug testing in schools, this study does show that random drug testing policies are effective in reducing the temptation to use drugs and alcohol.

REFERENCES

Vernonia School District 47J v. Action, 515, U.S. 646 (1995).

Todd v. Rush Co. School 133 F3d 984 (7th cir.), cert. Denied, 524 U.S. 824 (1998).

Trinidad Sch. Dist. 1 v. Lopez, 963 P2d 1095 (Colo., 1998).

Linke v. Northwestern Sch. Corp., 734 N.E. 2d 252 (Ind. Ct. App. 2000).

Board of Education of Independent School District No. 92 of Pottawatomie Court of Oklahoma v. Earls, 22 S.Ct. 2559 (2002).

1999 National Household Survey, http://www.samhsa.gov.

The Pride Survey, pridesurveys.com, 2000.

Charter Schools and Race

Preston Green
University of Massachusetts. Amherst

Introduction

a) Thirty-nine states, the District of Columbia, and Puerto Rico have adopted legislation for charter schools.

b) Charter schools are autonomous, or semi-autonomous, public schools that are created by a contract, or charter, between the school's organizers and a sponsor, usually the state's department of education or a local school district.

c) The creators of charter schools are held accountable for achieving educational results. In return, the charter school receives waivers exempting it from many of the restrictions that apply to traditional public schools.

d) Issues covered in outline

  i) Whether charter school racial balancing provisions, which require charter schools to reflect the racial composition of the surrounding school districts violate Equal Protection Clause

  ii) Whether race-neutral, charter school admission policies that might have the effect of creating one-race charter schools violate Equal Protection Clause

  iii) Legal issues pertaining to school desegregation decrees.

  iv) Legal issues pertaining to race-centric charter schools

2) Racial Balancing Provisions and the Equal Protection Clause

a) Types of Provisions

  i) Policies That Ensure Charter School Student Body Reflects Racial Composition of Surrounding School District – California, Florida, New Jersey, Ohio, Wisconsin, Wyoming

  ii) Charter School Student Population Must Reflect Racial Composition of Surrounding School District – Kansas, Minnesota, North Carolina

  iii) Charter School Student Population Must Fall within 10 Percent of Racial Composition of Surrounding School District – Nevada

b) Equal Protection Clause Question – Do such policies violate Equal Protection Clause?

  i) Analysis under Strict Scrutiny – Must be narrowly tailored to satisfy a compelling governmental interest.

    (1) Compelling Governmental Interest – probably does not satisfy a compelling governmental interest

      (a) Elimination of the Present Effects of Past Discrimination

        (i) Racial balancing provisions might not satisfy this interest because they apply to all charter schools, even if the districts in which they are located have not committed *de jure*, or official, segregation.

      (b) Obtaining a Diverse Student Body

        (i) Applicable case – Regents of the University of California v. Bakke, 438 U.S. 265 (1978) (finding that universities may use race as one of many factors to achieve this interest).

        (ii) Problem – racial balancing provisions rely on race alone, which is inconsistent with *Bakke*.

    (2) Narrow Tailoring – probably not narrowly tailored

      (a) United States v. Paradise 480 U.S. 149, 171 (1987)

        (i) Efficacy of alternative race-neutral remedies;

        (ii) Flexibility of the relief;

        (iii) Duration of the relief;

        (iv) Relationship of the numerical goals to the relevant population;

        (v) Impact of the policy on third parties.

      (b) Problems of racial balancing requirements

        (i) Efficacy – Lotteries might be just as effective.

        (ii) Flexibility – might be too inflexible because race is sole criterion

        (iii) Duration – no endpoint

        (iv) Relationship of numerical goals with relevant population -- Problem if the racial composition of the area in which the charter school was located differed substantially from the racial composition of the school district as a whole.

        (v) Impact on third parties – problem if other groups are denied on basis of race.

ii) Key Case

(1) Beaufort Cty. Bd. of Educ. v. Lighthouse Charter Sch. Committee, No. 97-CP-7-794 (S.C. Ct. Com. Pl. May 8, 2000) (finding that the state's charter school racial balancing provision, which required the charter school's student population to fall within 10 percent of racial composition of surrounding school district, was unconstitutional).

(2) Legislature responded to *Beaufort* by implementing the following provision in its enabling statute:

> In the event that the racial composition of an applicant's or charter school's enrollment differs from the enrollment of the local school district or the targeted student population by more than twenty percent, despite its best efforts, the local school district board shall consider the applicant's or the charter school's recruitment efforts and racial composition of the applicant pool in determining whether the applicant or charter school is operating in a nondiscriminatory manner. A finding by the local school district board that the applicant or charter school is operating in a racially discriminatory manner may justify the denial of a charter school application or the revocation of a charter. . . . A finding by the local school district board that the applicant is not operating in a racially discriminatory manner shall justify approval of the charter without regard to the racial percentage requirement if the application is acceptable in all other aspects.

3) Non-Racial Preferential Admissions Policies and the Equal Protection Clause

a) Several states have provisions that are racially neutral, but might have the effect of creating one-race charter schools (e.g., preferences for siblings of charter school students).

b) Rational basis test would be employed – rationally related to a legitimate governmental interest

c) Charter school provisions would probably be able to withstand such challenges – (e.g., enrollment preferences for the siblings of returning charter school students were rationally related to the legitimate concern of making life less complicated for parents).

4) **Court-Ordered School Desegregation Decrees**

- a) Ways that charter schools might violate school desegregation decrees
  - i) Might be more segregated than other public schools within the school district.
  - ii) Might make it difficult for school districts to satisfy school desegregation decrees by attracting a disproportionately high percentage of students and faculty of one race away from other public schools within the districts.
  - iii) Key case – Berry v. School Dist. of the City of Benton Harbor, 56 F. Supp. 2d 866 (W.D.Mich. 1999) (permitting the funding of one charter because the charter school's faculty and staff recruitment policies, curricular requirements, and diversity training of faculty, staff, and board of directors were consistent with the court order, but prohibiting the funding of another school because the school failed to provide sufficient information regarding the racial composition of the student body.
- b) Questions in need for further clarification
  - i) To what extent can desegregation decrees extend to charter schools that are located in segregated in school districts, but are sponsored by entities that are not under federal court supervision?
  - ii) May federal courts modify desegregation decrees to permit the funding of charter schools that are not in compliance with decree?

5) **Race-Centric Charter Schools**

   a) Equal Protection Clause Question – Do charter schools that have curricula and educational programming that appeal to a specific minority group violate *Brown v. Board of Education*'s mandate against *de jure* segregation of the public schools?

   b) If School is Located in School District Under Desegregation Decree – federal district could deny charter if school would have effect of substantially impeding operation of decree.

   c) If School is Located in School District that is not under Desegregation Decree

      i) Scenario #1 – racial composition of school reflected that of surrounding district – probably no violation because school's segregation was probably caused by factors unrelated to its educational theme, such as housing patterns. Therefore, plaintiffs would be unable to satisfy the causation requirement. Wendy Parker , *The Color of Choice: Race and Charter Schools*, 75 TUL. L. REV. 563 (2001).

      ii) Scenario #2 – racial composition of school does not reflect that of school district

         (1) One possible conclusion – school might violate Equal Protection Clause because "there is more than knowledge of the potential for segregation; indeed the very purpose of the school is segregative." Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256 (1979).

         (2) Other possible conclusion – school might be permissible because school is employing a cultural rather than racial classification.

Exploding the Myth of Academic Freedom: The Powder Keg of Standards And Accountability in California

Deborah E. Stine
Jim Hill
California State University, San Bernardino

Paper presented to the Education Law Association, 48th Annual Conference, *Balancing Rights: Education Law in a Brave New World, New Orleans, Louisiana, November 14-16, 2002.* Presenters may be contacted at: California State University, San Bernardino, School of Education, 5500 University Avenue, San Bernardino, CA. 92407. E-mail: dstined@aol.com

Exploding the Myth of Academic Freedom: The Powder Keg of Standards and Accountability in California

This paper examines the current status of standards and assessment in California. Examples of standards and accountability systems in use or pending demonstrate the degree to which the content and process of curriculum and delivery are mandated and in some cases scripted for daily use. The focus for the school administrator has become more and more focused on improving student performance on the various assessments, and penalties for lack of progress are foreboding. It is imperative that professors of Educational Administration keep current on national state law and address accountability systems within the context of their programs and work with future and current administrators to provide assistance in managing and meeting the requirements of the accountability systems.

John Mockler, the past Executive Director of the State Board of Education (California) has admitted that the fast pace plus a lack of communication has left many educators, who must implement and assess the new standards, confused (California Student, 2001). Opponents conclude that assessment strategies driven by accountability often do little improve teaching and learning (Sirotnik, 2002). Some questions that need to be addressed in examining the current system of accountability include: 1) Shall we have in place systems that are judged by tests that are not yet piloted and not completely aligned with curriculum, simply to have scores reported at the determined time, taking valuable time from teachers/administrators in the delivery? 2) What alternatives need to be considered? These are significant questions for our profession. As we begin to attempt to answer these questions, the role that both professors and practitioners can and must play will be examined.

The premise of an accountability system based on high-stakes testing is addressed by the American Educational Research Association (AERA) through a recent policy statement:

> Many states and school districts mandate testing programs to gather data about student achievement over time and to hold schools and students accountable. Certain uses of achievement test results are termed "high stakes" if they carry serious consequences for students or for educators. Schools may be judged according to the school-wide average scores of their students. High school-wide scores may bring public praise or financial rewards; low scores may bring public embarrassment or heavy sanctions. For individual students, high scores may bring a special diploma attesting to exceptional academic accomplishment; low scores may result in students being held back in grade or denied a high school diploma.

Policy makers with the intention of improving education enact these various high-stakes testing applications. For example, it is hoped that setting high standards of achievement will inspire greater effort on the part of students, teachers, and educational administrators. Reporting of test results may also be beneficial in directing public attention to gross achievement disparities among schools or among student groups. However, if high stakes testing programs are implemented in circumstances where educational resources are inadequate or where tests lack sufficient reliability or validity for their intended purposes, there is potential for serious harm. Policy makers and the public may be misled by spurious test score increases unrelated to any fundamental educational improvement; students may be placed at increased risk of educational failure and dropping out; teachers may be blamed or punished for inequitable resources over which they have no control; and curriculum and instruction may be severely distorted if high test scores per se, rather than learning become the overriding goal of classroom instruction. (AERA Position Statement, 2002)

Those "in the know", the professional educators and professors of educational administration, have been "left out of the loop," in the decision-making and implementation phases of the high stakes testing programs which have been legislated in states throughout the United States, including California. The focus of this paper is on the current system in California, its successes and failures, and on the mandates that dictate its implementation.

Accountability in California

Currently, the California accountability system is based totally on test scores: one nationally normed test, one to four state standards criterion referenced tests depending on the school year, and for high schools, the new graduation or 'exit' exam. This testing system, which is being put into place and will be changing each year over the next four to five years until fully in place, has spawned a whole new vocabulary. A school is judged on its growth/performance through specific determinations related directly to test outcomes. To say that the accountability system contains multiple elements and is extremely daunting would be to soft pedal a Herculean task that faces current administrators in the state.

The Academic Performance Accountability Act or APAA [originally California Senate Bill X1 of 1999] (CDE, Public Schools Accountability, 2002) uses test scores as the basis of calculating the *academic performance index* (API) that is based on a complex formula of how well students achieve on these tests. California schools are then ranked in 'deciles' on a bell curve, and schools in the bottom five or bottom half of all schools are declared to be 'underperforming'. Additionally, schools also have to show increases in their API each year or they are also classified as 'underperforming'. Being underperforming makes a school eligible for one of the intervention programs mandated by the state. Schools in intervention programs that do not make their API growth for two years in a row run the risk of heavy sanctions. In June, 2002, districts were hearing in assessment meetings that in the fall of 2002, some schools (up to 123 of the first group of schools in the improvement plan did not meet their growth requirements) could be targeted for full takeover, which would mean taking the school out of the local school district, giving it to a county office of education, institute of higher education (IHE), or private company to manage, replacing the principal and possibly the teaching staff.

The current emphasis on accountability in the state of California accompanies a previous investment in school reform in the late 1990s, when the state adopted detailed academic content standards to guide classroom instruction (CDE, Content Standards, 2002). To say that California school administrators are living in a condition of shock and fear or full denial pretty well summarizes the situation.

For three years (1999, 2000, 2001), student percentile rankings on Scholastic Aptitude Tests (SAT 9) subtests were grouped in quintiles (e.g., how many students at a given school site scored between the 0 and 19th national percentile ranks in reading), and included a 'weighting value' for students in each quintile was figured. All values were then added together, and then multiplied by the value of each testing subject to determine the school's API. API scores range between 200 and 1000, with 800 being the current 'interim growth target'. Beginning in 2001, schools received a second API score, called the 'base' API for that year. The base API included for the first time, student results on the English Language Arts California Standards Test (ELA CST). This series of tests is based on the California ELA standards and is a criteria test. Here, student raw scores are divided again into quintiles called 'performance levels'. The levels are named: Advanced, Proficient, Basic, Below Basic, and Way Below Basic. The number of students hitting each level has become a major factor in calculating the 2001 Base API. In 2002, the Base API will include math standards test results. In 2003, science and history standards results will be added to API calculations at some grade levels. Writing is tested at 4th and 7th grades, and will be an important component of the ELA scores in 2003.

High schools will have the new Exit Exam (CAHSEE – California High School Exit Exam) added to the API in 2002. A high school exit exam in language arts and mathematics was adopted in 1999, and about 78% of ninth graders took it voluntarily in Spring 2001. California's new graduation or 'exit exam' takes effect with the Class of 2004, unless the State Board of Education decides to delay implementation for a year or two. The six-hour exam will be given three times a year at every high school in the state, on exact dates specified by the state. Students must pass each of two parts, and must keep taking the part(s) they did not pass until they do pass. They may try one last time to pass the exam in the late summer after they have graduated. Schools are required to track student test results, provide remediation programs after each test administration for students who do not pass, and inform parents of these programs. The exam tests English and math at present: The State Board has expressed the desire to add science and history in the future. The exam also includes several writing samples.

The APAA mentioned a number of things that could be included in the API, but there is at present in California no statewide data system to track some of these in a consistent manner. Nor, in fact, is there a data system to track student test scores state wide. Districts have to scramble to hire companies to produce achievement data for them. All the determinations of the API are made (according to the APAA) by the State Board of Education (SBE). The 'interim' growth API target of 800 was set, and State Board minutes occasionally reference the desire to raise this target in the future. The weighting value of students at each quintile, the raw score needed to hit each performance level on any of the standards tests, and the raw scores needed to pass the Exit Exam, are all set by SBE, empowered to do so by the state legislature.

In addition, legislation has created two huge staff development programs. All K-8 teachers in California, about 170,000 in all, are required to complete a major program in the teaching of reading and math over the next three years, using the SBE selected reading and math programs. SBE selected two highly scripted reading programs for local districts to choose between (Open Court and Direct Instruction). Additional legislation requires that all principals and other site administrators in the state will be required to complete a staff development program also over a three year span. In this program they will learn about the SBE selected reading and math instructional materials mentioned above, and how to interpret and use the test score data to measure achievement growth. Organizations wishing to become trainers for either of these programs apply to SBE, providing materials down to and including most of the overhead transparencies or power point slides to be used in training, should the organization pass muster.

This current accountability system is additionally exacerbated by a new bill (AB 75), which will allow teachers to pass a test to become a principal – partially a result of the current lack of credentialed administrators in the state and possibly a realistic reflection of the increasing shortage yet to come as accountability comes fully on line.

Federal legislation and assessment in California

To add to this, in January of 2002, the federal *No Child Left Behind Act (Pub. L.N. 107-110)* which reauthorizes the Elementary and Secondary Education Act (ESEA) is a daunting addition to all practitioners. Principals who are not aware of these new rules and how they will affect principals and schools should become acquainted with them. The 'No Child Left Behind' legislation both reinforces these potential sanctions and adds some additional rules. Ultimately, schools have to show increasing test score results. State accountability systems have come up to the new federal expectations (California may have to increase its requirements for yearly growth, for example) and schools that do not show growth will be sanctioned, first with having to use federal money to support transportation to other schools for parents who wish that, and ultimately facing staff replacements.

The legislation is huge; it contains more than 1000 pages on the website. The summary is well over 200 pages. The length by itself increases the level of difficulty for already overworked site administrators in understanding the specifics of the document. State departments of education are currently engaged in negotiations with the goal of clarifying and developing individual state responses to the legislation.

Basically, schools are required to bring all students to 'proficiency', defined roughly along the lines of the National Assessment of Educational Progress (NAEP) in 12 years. This is to be defined by performance on tests at specified grade levels. At the same time, states will have to administer NAEP regularly, as NAEP results will have to show growth as well.

Schools must show an average of 8% growth in test scores each year (100% divided by 12 equals 8). This growth must be school wide AND for each specified group (poverty, race and ethnicity, disability, and limited English proficiency). Schools that do not make this growth two years in a row face sanctions, beginning with parental choice, allowing parents to select another school for their children, either inside or outside of their current school district. The sanctioned school would pay the cost of transportation out of its federal funds, should this happen. Sanctions are extended for continued failure to make the required growth, and include the transfer of teaching faculty, replacement of the school's administration, full takeover of the school by a state agency or private company, and finally, closing the school.

The measure of success rests totally on tests, along with NAEP. For measurement of school success, multiple measures no longer exist.

Additionally, schools (as of the start of the school year in fall 2002) must hire only fully credentialed teachers for Title I classes. By the 2005-6 school year, all teachers at a Title I school site must by fully credentialed. Instructional aides must, within four years, have completed at least two years of college, and any new hires as of fall 2002 must meet that requirement. To exacerbate the problem, this comes at the same time as a shortage of teachers, whether fully credentialed or not.

- The following list includes some of the more significant provisions that are required at the beginning of the 2002-2003 school year. Additional requirements related to accountability, testing, and a host of other issues will kick in after the 2002-2003 school year:
- New Title I teachers must be "highly qualified" as defined by ESEA, which means that each new Title I teacher must be state certified and pass a state test.School districts and states must work toward having all teachers highly qualified by the end of the 2005-06 school year and must submit annual reports on their progress.
- States and school districts must produce annual report cards of students' progress toward meeting state standards, graduation rates, names of schools that need improvement, qualifications of teachers, and percentages of students who were not tested.
- Schools previously identified as in the first year of school improvement (as defined by ESEA before the passage of the *No Child Left Behind Act*) must begin mandatory public school choice.
- Schools previously identified as being in the second year of school improvement or corrective action (as defined by ESEA) will be required to provide public school choice and supplemental educational services (such as tutoring or after school programs.) (DeWitt, 2002, 1 & 9)

Beginning in the 2005-06 academic year, all schools in the United States will be required to test students annually in reading and math between grades 3 and 9, and at least once in grades 10 through 12. Under the law, states and the federal government are required to provide assistance to schools that are not performing, but failure to perform may eventually have ramifications for students and school staff members. In a worst-case scenario, those ramifications could include denial of a diploma; reconstitution of the school; or termination of staff and administration.

The U.S. Department of Education is charged with developing guidelines and regulations that further delineate how to apply the *No Child Left Behind Act* and clarifying legislative language in the law that is ambiguous or needs further explanation. The new law requires states and school districts to develop plans that indicate how the goals and requirements of the federal law are being met.

It is easy to see why current school administrators who, for the most part, have yet to see the federal legislation, feel overwhelmed—or live in a state of denial. Professors of Educational Administration can and should provide ideas, strategies, and approaches for the practitioners as they meet these daunting new challenges. Practitioners will need help in combining the demands for improved test scores with best instructional practices.

Accountability Report Card

All of these measures are confronting administrators in the schools of California. Additionally, accounting to the public through the vehicle known as the *School Accountability Report Card (SARC)* is one more task for all. This SARC has a checkered past in terms of monitoring in the state. The SARC was first required during the 1989-90 school year. It, at that time, appeared generally to provide parents and other concerned parties with interesting and useful information about their local schools. At the same time, however, many appeared to provide little comparative information enabling evaluation of the relative achievement of students within and among schools. Often, the release of the document was for public relations – and essential facts were not forthcoming (any weaknesses as opposed to strengths).

In July of 1990 the California State Board of Education adopted the *Accountability Report Card* specifying 13 school conditions. In 1994, with AB 198, and in 1995, with SB 1664, these increased to 16 the number of specified conditions to be reported. They were as follows:

Student achievement in and progress toward meeting reading, writing, arithmetic, and other academic goals; Progress toward reducing dropout rates;

1. Estimated expenditures per student and types of services funded;
2. Progress toward reducing class sizes and teaching loads'
3. Any assignment of teachers outside their subject areas of competence;
4. Quality and currency of textbooks and other instructional materials;
5. The availability of qualified personnel to provide counseling and other student support services;
6. Availability of qualified substitute teachers;
7. Safety, cleanliness, and adequacy of school facilities;
8. Adequacy of teacher evaluations and opportunities for professional improvement;
9. Classroom discipline and climate for learning;
10. Teacher and staff training, and curriculum improvement programs;
11. Quality of school instruction and leadership;
12. The degree to which students are prepared to enter the work force (applicable to high schools only);

13. The total number of instructional minutes offered in the school year, separately stated for each grade level, as compared to the total number of instructional minutes per school year required by law, separately stated for each grade level; and

14. The total number of minimum days in the school year, as specified in Sections 46112, 46113, 46117 and 46141 of the Education Code.

(CDE, School Accountability Report Card, 2002)

If the school is in a district operating more than one school, each of the following also must be included in the SARC:

1. Beginning, midrange, and highest annual teacher's salary;
2. Average school-site principal's annual salary;
3. District superintendent's annual salary;
4. Percentage of budget for teachers' salaries; and
5. Percentage of budget for administrative salaries.

To insure that the public (and particularly the parents of children in the schools) are aware of the specifics of a school site, in 1998 Governor Wilson signed two bills into law (AB 568 and AB 572) making major changes to the School Accountability Report Card. These became effective on January 1, 1998. The first (AB 568), required school districts connected to the Internet to make the information in the School Accountability Report Card accessible on the Internet by July 1, 1998. The second (AB 572) required that schools make an effort to notify parents of the purpose of the SARCs and ensure that all parents receive a copy of the report card. It also required that the most recent three years of data be provided in the areas of pupil achievement in reading, writing, arithmetic and other academic goals, dropout rates, progress towards reducing class sizes, number of credentialed teachers with emergency credentials, teachers working without credentials and teachers working outside their subject areas of competence, number of days of staff development, and suspension and expulsion rates.

AB 1632, Chaptered on 8/31/00, in the interest of consistency in schools across the state, added new data requirements effective 7/1/00, including:

- Adds additional assessments of school conditions
- Requires CDE to develop and recommend to the SBE for adoption of as standardized SARC template.
- Requires CDE to post the completed and viewable template on the Internet.
- Requires CDE to develop and recommend to the SBE for adoption, standardized definitions for the required data elements.
- Requires LEAs with access to the Internet to make their SARCs available on the Internet.
- Requires CDE to maintain links to the SARCs posted on the Internet.

- Requires schools to ensure that all parents receive a copy of the report card.

On February 21, 2002, AB 2558 was introduced, requiring the State Department of Education to develop and implement a system for collecting and reporting indicators from each public school. The resultant system would set forth criteria that would be required to be included in the reports, including information regarding school safety, pupil discipline, pupil performance, school staff, length of the school year, enrollment, average daily attendance, pupil dropouts, pupil-staff ratio, staff development days, school history, and school funding. The bill would require that the SDE issue a report card for each public school in the state that include an *academic performance* grade. To the extent the bill would impose additional requirements on school districts, it would impose a state-mandated local program (CDE, Bill Documents, 2002).

Finally, the imperative of proper submission and documentation is communicated in a recent EdCal (July 1, 2002), stating:

> School Administrators take heed: officials from the California Department of Education are hunting down schools that have not published their School Accountability Report Cards as required by law . . . In past years, districts that failed to publish their SARCs were hardly noticed by state officials. But now, the CDE is required to monitor and enforce the regulation, in the wake of Senate Bill 1632, Poochigian, R- Fresno, which was signed into law by Gov Gray Davis last year. (State Increasingly Monitoring, p.2)

Conclusion

The AERA policy statement sets forth a set of conditions essential to sound implementation of high-stakes educational testing programs. They are as follows:

1. Protection Against High-Stakes Decisions Based on a Single Test.

As a minimum assurance of fairness, when tests are used as part of making high-stakes decisions for individual students such as promotion to the next grade or high school graduation, students must be afforded multiple opportunities to pass the test. More importantly, when there is credible evidence that a test score may not adequately reflect a student's true proficiency, alternative acceptable means should be provided by which to demonstrate attainment of the tested standards.

2. Adequate Resources and Opportunity to Learn.

When testing is used for individual student accountability or certification, students must have had a meaningful opportunity to learn the tested content and cognitive processes. Thus, it must be demonstrated that the tested content has been incorporated into the curriculum, and that materials and instruction of students are provided before high-stakes consequences are imposed for failing examinations.

3. Validation for each Separate Intended Use.

Each separate use of a high-stakes test, for individual certification, for school evaluation, for curricular improvement, for increasing student motivation, or for other uses requires a separate evaluation of the strengths and limitations of both the testing program and the test itself.

4. Full Disclosure of Likely Negative Consequences of High-Stakes Testing Programs. When credible scientific evidence suggests that a given type of testing program is likely to have negative side effects, test developers and users should make a serious effort to explain these possible effects to policy makers.

5. Alignment Between the Test and the Curriculum

When testing is for school accountability or to influence the curriculum, the test should be aligned with the curriculum as set forth in standards documents representing intended goals of instruction. Multiple test forms should be used or new test forms should be introduced on a regular basis, to avoid a narrowing of the curriculum toward just the content sampled on a particular form.

6. Validity of Passing Scores and Achievement Levels.

When testing programs use specific scores to determine "passing: or to define reporting categories like "proficient" the validity of these specific scores must be established in addition to demonstrating the representativeness of the test content. To begin with, the purpose and meaning of passing scores or achievement levels must be clearly stated. Once the purpose is clearly established, sound and appropriate procedures must be followed in setting passing scores or proficiency levels.

7. Opportunities for Meaningful Remediation for Examinees Who Fail High Stakes Tests.

8. Appropriate Attention to Language Difference Among Examinees.

Special accommodations for English language learners may be necessary to Obtain valid scores.

9. Appropriate Attention to Students with Disabilities.

10. Careful Adherence to Explicit Rules for Determining Which Students Are to be tested. When schools, districts, or other administrative units are compared to one another or when changes in scores are tracked over time, there must be explicit policies specifying which students are to be tested and under which circumstances students may be exempted from testing. Such policies need to be uniformly enforced to assure the validity of score comparison. In addition, reporting of test score results should accurately portray the percentage of students exempted.

11. Sufficient Reliability for Each Intended Use. Reliability refers to the accuracy or precision of test scores. It must be shown that scores reported to individuals or for schools are sufficiently accurate to support each intended interpretation. Accuracy should be examined for the scores actually used. For example, information about the reliability of raw scores may not adequately describe the accuracy of percentiles; information about the reliability of school means may be insufficient if scores for subgroups are also used in reaching decisions about schools.

12. Ongoing Evaluation of Intended and Unintended Effects of High-Stakes Testing.

With any high-stakes testing program, ongoing evaluation of both intended and unintended consequences is essential. In most cases, the governmental body that mandates the test should also provide resources for a continuing program of research and for dissemination of research findings concerning both the positive and negative effects of the testing program. (AERA Position Statement, 2000)

Many of the areas enumerated through the policy statement, especially those indicants of validity, are not currently addressed by the system in place in the state of California.

Those individuals responsible for the teaching and of the standards, which are required, have simply not been a part of this far-reaching assessment and accountability system. A recent student of Educational Administration cites complaints, fears and suggestions for the future, stating:

> The major change in assessment is the alignment to the state standards. The entire education system in California is geared to make sure students are all being educated according to the same guidelines. The complaints I hear from teachers is the abundance of assessments without knowledge of how the results are used and to what purpose. Teachers want to be in the communication loop so that they feel part of the decision-making process and that their hard work counts! If assessment results are not used effectively, the system seems like it is spinning its wheels. Within my school, my district, and the county, policies seem to be implemented and interpreted in many different ways. There is an accountability issue that concerns me. There is a definite need to improve the utilization of assessment systems and communication at all levels.
>
> If I were to develop a plan to alter the existing inefficiencies, I would first set up a schematic diagram of the process. This plan would include: the name of the assessment, why it is required, how the information will be utilized, and a reporting procedure for communication to all district personnel and parents. Secondly, I would design strategies with the leadership team that teachers could use for student/parent accountability as they are promoted from one grade level to the next. This would include a checklist of what the student understands and need more help with, accompanied by key artifacts. Assessments must be purposeful, useful and communicated to everyone with a stake in the education of students. If we team up – we can move mountains. (Edwards, D., personal communication)

How do we move those mountains? Professors of educational administration can provide practitioners with several kinds of assistance. State legislatures and Congress have mandated accountability based on test scores, and whatever else practitioners do, the numbers have to go up if they hope to survive as a school. Professors also need to design and undertake research projects that demonstrate the connections between active learning and higher test scores. A knowledge base needs to be provided that practitioners can utilize that pinpoints open ended, problem based, project based, and higher level thinking and learning as part of a focused program to raise test scores. Help needs to be provided to practitioners by professors of educational administration to keep those at the school sites from being overwhelmed, and to help them to not fall prey to those who recommend—and usually sell—narrowly focused test preparation materials. Practitioners also require assistance in functioning as instructional leaders who have the skills to align state and national standards to higher levels of instruction and curriculum. One major strategy that could be suggested would be to create content standards based learning units that generalize and integrate across two or more content areas. In conclusion, the task of professors is immense; it matches the task of current practitioners in the field. Professors need to provide future administrators with the tools to assess, interpret assessments, and the knowledge of all current accountability mandates to present the information to the teachers, the parents, and the community in the best interest of the students of the school. The goals of higher education and K-12 are the same in this interest, to educate. Professors of educational administration can help practitioners, and prospective practitioners, learn to approach and integrate curricular areas, and to function as instructional leaders who can lead teaching faculty to do the same. This is an imperative – we are accountable.

REFERENCES

American Educational Research Association (AERA). (July, 2000). *AERA positions statement concerning high stakes testing in PreK-12 education.* Author. Retrieved from http://www.aera.net/about/policy/stakes.htm

California Department of Education (CDE). *Bill Documents.* Author. Retrieved July 13, 2002 from http://leginfo.ca.gov/

California Department of Education (CDE). (December 21, 2001). *Content Standards for California* Public schools: *Kindergarten through grade twelve. Author. Retrieved from* http://*www.cde.ca.gov/standards*

California Department of Education (CDE). (March, 2002*). Policy and evaluation division: School Accountability Report Card.* Author. Retrieved from *http://.www.cde.ca.gov/ope/sarc*

California student achievement. EDSource. (June, 2002).

DeWitt, S. (May, 2002). New federal accountability requirements to kick in next year: Are you and your school prepared? Newsleader, 49(9), 1 & 9.

Sirotnik, K. A. (May, 2002). Promoting responsible accountability in schools and Education, *Phi Delta Kappan, 7(2),* 662-673.

State increasingly monitoring progress of mandatory accountability report cards. (2002, July 1), *EdCal, 32(1),* 2.

Balancing the Rights and Responsibilities of the School Board and the Public's Right to Know:

California's Open Meeting Law

David O. Stine

Sherry G. Gordon
Atkinson, Adelson, Loya, Ruud & Romo
3612 Mission Inn Ave. Upper Level
Riverside, CA 92501

Education Law Association
48th Annual Conference
New Orleans, LA
November 14-16, 2002

BALANCING THE RIGHTS AND RESPONSIBILITIES OF THE SCHOOL BOARD AND THE PUBLIC'S RIGHT TO KNOW: CALIFORNIA'S OPEN MEETING LAW

OPEN MEETING LAWS

All fifty states have adopted some form of public meeting laws which require local school officials to conduct their business in open sessions in front of the press and the public except in very limited circumstances. These laws create an obvious tension between board members, who must become experts in the fine nuances of the law, and members of the public, who might prefer to have all public business conducted in public session.

California's Brown Act (California Government Code section 54950 et seq.) is but one example of how state legislatures have struck the balance between public access to local legislative bodies on the one hand and the need for confidential candor, debate and problem-solving on the other.

THE GENERAL RULE

The general rule is that all meetings of the legislative body of a local agency shall be open and public, and all persons shall be permitted to attend any meeting of the legislative body of a local agency. [California Government Code section 54953.] Legislative bodies include school district governing boards and subordinate commissions, committees, boards, whether permanent or temporary, decision-making or advisory, created by resolution or some other formal action of a legislative body. [California Government Code section 5492(b).]

Many states, including California, exclude advisory committees composed solely of members of the legislative body which are less than a quorum of the legislative body as long as such committees are not standing committees. [California Government Code section 54952(b).]

WHAT IS A MEETING?

Generally, an actual meeting is required before the open meeting requirements are triggered. A "meeting" is a gathering of a quorum of the legislative body, no matter how informal, where business is discussed or transacted. The term "meeting" has been interpreted to include "study," "discussion," "informational," "fact-finding," or "pre-meeting" gatherings of a quorum of the members of a board whether or not action is taken. In California a "meeting" occurs whenever there is a congregation of a majority of the members of the legislative body at the same time and place to hear, discuss or deliberate upon any topic that is within the subject matter jurisdiction of the body. [California Government

Code section 54952.2(a).] California specifically considers the use of direct communication, personal intermediaries, or technological devices in determining whether there has been a "meeting." [California Government Code section 54952.2(b).] There are also special provisions for teleconference meetings whether by audio or video means. [California Government Code section 54953(b).] The provisions require, however, that such meetings must be conducted in a manner that protects the statutory and constitutional rights of the parties and the public.

Recognizing that elected officials often attend strictly ceremonial events or public gatherings where issues of community interest are discussed, most states, including California, statutorily exclude attendance of a majority of the members of a board at such events provided that a majority of the members do not discuss among themselves business of a specific nature that is within the subject matter jurisdiction of the legislative body. [California Government Code section 54952.2.]

MEETING PROCEDURES

Most states require that local agencies hold regularly scheduled meetings. For instance, California generally requires monthly meetings. Absent a statutory exception, those meetings must be held within the boundaries of the agency. [California Government Code section 54954.] The local agency must post timely notice of its meetings and provide copies of the written agenda and related documents to requesting members of the public. The agendas must reasonably apprize the public of the matters to be considered in sufficient detail to allow the public whether to participate at the meeting.

While California, like many other states, requires public agencies to provide an opportunity on each agenda item for members of the public to address the local agency, it also has very specific limits on what members of the legislative body may say in response to such public comment. Since the topics of such comments may not have prepared on the body's agenda, members may only respond briefly, ask clarifying questions, request that staff report back or direct that the matter be placed on a future agenda. [California Government Code section 54954.2(a).] Further, California *Brown Act* specifically provides that local agencies may not prohibit public criticism during its meetings. [California Government Code section 54954.3(c).]

One of the thornier debates related to public meeting agendas relates to public dissemination of materials distributed to members of the legislative body during meetings. Most, if not all, states require that such documents be made available to the public absent a specific statutory exemption. [See California Government Code section 54954.3.]

When action is taken during a public session, such action must not be by secret ballot. Such action would, of course, preclude attending visitors from determining the position of any given legislative member on a specific issue.

CLOSED SESSIONS

While the general rule is that all meetings of the governing boards of local agencies must be held in public, all state legislatures have provided limited exceptions under which the legislative bodies may properly meet in closed session. Because such sessions are the exception to the rule, they are very narrowly interpreted by the courts. California's statutory scheme allows closed sessions, for example, to consider appointment, employment, evaluation of performance, and discipline or dismissal of an employee. Elected officials are specifically excluded, however, from the definition of employee. California local agencies may also meet in closed session to consider charges against employees. Further provision is made for closed session to discuss pending or threatened litigation, student discipline, collective bargaining, real property transactions, and tort claims. [California Government Code sections 54956.8, 54956.9, 54956.95 and California Education Code sections 35146 and 72122.]

ENFORCING PUBLIC MEETING LAWS

California's *Brown Act* contains criminal penalties applicable to any member of a board who attends a meeting where action is taken in violation of any provision of the Act and where the member intends to deprive the public of information to which the member knows or has reason to know the public is entitled to under the Act. There is an exception for good faith reliance on advice of legal counsel. [California Government Code section 54959.] Aside from criminal liability, civil remedies may include a requirement that future closed sessions be taped and/or voiding the illegal action. Prior to filing an action for violation of the Act, a complainant must make a demand that the local agency cure the alleged violation.

AUDITING THE PUBLIC MEETING PROCESS

The principle of governance through elected representatives is a key dimension to a true democracy. Our public schools must continue to practice effective governance by balancing the responsibilities of the boards and the rights of the constituents. The business of the board must be done in public and be open to public scrutiny.

Although this presentation has provided a brief preview of the laws in California, the following portion is an exercise to test the audience's perceptions. Both school board members and administrators need to know the laws which guide them as they conduct the people's business. Each of the 24 items in this legal audit is designed to challenge the individual and to clarify selected critical concepts.

QUESTIONS FOR
A PUBLIC MEETING ACT AUDIT

	QUESTION	T	F
1.	The Brown Act only applies to the governing body of a school or community college district and not to the committees or commission the governing body establishes. (Gov. Code § 54951)		
2.	Any member of the board may place matters on the board agenda directly related to school district business. (Ed. Code § 35145.5)		
3.	An ad hoc committee consisting of three members of a five-member board established to select a new superintendent is not subject to the Brown Act. (Gov. Code §§ 54952(b) and 54952.2(a))		
4.	Standing committees composed solely of less than a quorum of the members of the governing board are subject to the Brown Act. (Gov. Code § 54952(b))		
5.	A superintendent's cabinet which is established by the superintendent without formal action by the governing board is not subject to the Brown Act. (Gov. Code § 54952(b))		
6.	All five members of the board go together to see Evita. This "meeting" is subject to the Brown Act. (Gov. Code § 54952.2(a))		
7.	On a five-member board, board member X calls member Y who in turn calls member Z for the purpose of sharing their views on a matter on the board's upcoming meeting agenda. A meeting under the Brown Act has occurred. (Gov. Code § 54952.2(b))		
8.	The superintendent can informally poll members of the governing board to determine their position on a particular issue within the board's jurisdiction.		
9.	It is not a meeting under the Brown Act for a majority of the Board to attend a community forum on a statewide bond measure affecting education. (Gov. Code § 54952.2(c))		
10.	For an action to be taken under the Brown Act, there must be a formal vote by the members of the governing board. (Gov. Code § 54952.6)		
11.	Board members can meet through video teleconferencing or telephone conference call. (Gov. Code § 54953)		

QUESTION	T	F
12. The public has a right to videotape or tape record the open session of a board meeting. (Gov. Code § 54953.5)		
13. The Board may schedule a retreat at a location outside the boundaries of the District so long as no action is taken at the meeting. (Gov. Code § 54954)		
14. The governing board is required to establish a time and place for holding its regular meetings by resolution, rule or other official action. (Gov. Code § 54954(a))		
15. No action or discussion may be undertaken on any item not listed on the agenda except to respond to members of the public addressing the board at the meeting. (Gov. Code § 54954.2(a))		
16. The agenda must be posted at least 72 hours before the meeting and may not be changed after posting. (Gov. Code § 54954.2(b))		
17. The agenda must provide for members of the public to have an opportunity to address the board before or during the board's consideration of the item. (Gov. Code § 54954.3(a))		
18. The governing board can prohibit public criticism of school district personnel and require that such criticism be done in closed session. (Gov. Code § 54954.3(c))		
19. An agenda item such as "Personnel" would allow consideration of an action to approve the evaluation of the superintendent. (Gov. Code § 54954.5)		
20. In considering employee discipline, the closed session agenda must identify the name or position of the employee. (Gov. Code § 54954.5(e))		
21. All votes taken in closed session must be reported in open session. (Gov. Code § 54957.1)		
22. Where an action in closed session must be reported, the vote or abstention of each member must be stated. (Gov. Code § 54957.1(a))		
23. The governing board may begin its meetings in closed session.		
24. The superintendent's "Weekly Update" is not subject to disclosure under the Public Records Act because it contains personnel information. (Gov. Code § 54957.5)		

ANSWERS TO
A PUBLIC MEETING ACT AUDIT

1. *False.* Under Government Code section 54951, a public agency is defined to include any board, commission, or agency that is a part of a "local agency" that is subject to the Brown Act.

2. *True.* Members of the public are entitled to place items on the agenda of school board meetings. Districts can adopt reasonable rules and regulations to establish a process for placing items on the agenda. (Ed. Code § 35145.5)

3. *False.* Any meeting of the majority of the members of the legislative body is subject to the Brown Act. (Gov. Code §§ 54952(b) and 54952.2(a))

4. *True.* Under recent Brown Act amendments, standing committees of the legislative body having a continuing subject matter jurisdiction or a meeting schedule set by charter, ordinance, resolution for formal action of the legislative body are legislative bodies under the Brown Act. (Gov. Code § 54952(b))

5. *True.* Advisory bodies established without formal action of the governing board are not subject to the Brown Act. (See Gov. Code § 54952(b))

6. *False.* The attendance of the majority of the members of the governing board at a purely social event is not a meeting under the Brown Act provided they do not discuss among themselves business within the subject matter jurisdiction of the district.

7 *True.* The use of personal intermediaries by a majority of the board to develop a collective concurrence on an item is prohibited by the Brown Act. (See Gov. Code § 54952.2(b))

8. *False.* See answer to #10 above. However, it could be argued that merely polling members of the board is not communicating to them for the purpose of obtaining "collective concurrence."

9. *True.* Attendance of the majority of the board at open and publicized meetings organized to discuss topics of local community concern does not constitute a meeting under the Brown Act provided the board members do not discuss among themselves items of a specific nature that are within the subject matter jurisdiction of the District. (See Gov. Code § 54952.2(c))

10. *False.* Any collective commitment or promise by a majority of the members of the board to make a positive or negative decision is an action taken under the Brown Act. (See Gov. Code § 54952.6(c))

11. *True.* Government Code section 54953(b) permits teleconferencing, not just "video teleconferencing," for all purposes in connection with any meeting within the subject matter jurisdiction of the legislative body.

    (a) Teleconference means a meeting of individuals in different locations, connected by electronic means, through either audio or video, or both.

    (b) Teleconference meetings must comply with all requirements of the Brown Act and all other applicable provisions of law relating to the specific type of meeting or proceeding.

    (c) All votes taken during a teleconferenced meeting shall be by rollcall.

    (d) Agendas must be posted at each teleconference location, agendas must identify each Teleconference location, and each location must be accessible to the public. The agenda must provide an opportunity for the public to address the legislative body directly at each teleconferencing location.

    (e) During the telconference, at least a quorum of the members of the legislative body shall participate from locations within the boundaries of the territory over which the local agency exercises jurisdiction.

    (f) Teleconferenced meeting must be conducted in a "manner that protects the statutory and constitutional rights of the parties or the public." (See Gov. Code §54953(b)(3).)

12. *True.* The public's right to audio or video tape record a meeting can be overridden by the board if it makes a reasonable finding that the recording constitutes a persistent disruption of the meeting. (See Gov. Code § 54953.5(a))

13. *False.* The board may meet outside of the boundaries of the District for only limited reasons as set forth in Government Code section 54954. Governing boards of community college districts are subject to even stricter limitation. (See Ed. Code § 72000(d))

14. *True.* (See Gov. Code § 54954(a)) The board many cancel a regularly held meeting in advance or adjourn a regular meeting to a time and place specified in the order of adjournment. (Gov. Code § 54955) Less than a quorum of the board may adjourn the meeting.

15. *True.* The Brown Act not only limits the board from taking action on items not listed on the agenda but also prohibits discussion of nonagenda subjects. Governing boards should exercise caution in how agenda items are worded. Defining an item in too narrow a fashion can restrict discussion of the item. However, a broad, all encompassing agenda item (e.g. Discussion of District goals and objectives) probably violates the Act.

16. *False.* Section 54954.2 allows for changing the agenda under certain circumstances. For example, the agenda can be modified by a 2/3 vote of the legislative body where it is established that there is a need to take immediate action and the need for action came to the attention of the local agency subsequent to the agenda being posted. (See Gov. Code § 54954.2(b))

17. *True.* Regular meeting agendas are required to provide an opportunity for members of the public to address the legislative body on any items of interest to the body both before and during the legislative body's consideration of the item. The agenda should also include a provision authorizing members to directly address the legislative body concerning any item of interest to the public. (See Gov. Code § 54954.3(a))

18. *False.* Under *Baca v. Moreno Valley Unified School District*, it now appears that governing boards are prohibited by the First Amendment from limiting public criticism of school officials.

19. *Probably False.* Such a listing would probably be held to be inadequate to describe the matters to be discussed in closed session, particularly in view of the "safe harbor" language specified in section 54954.5.

20. *False.* The "safe harbor" agenda language for employee discipline only requires the statement "PUBLIC EMPLOYEE DISCIPLINE/DISMISSAL/RELEASE." No additional identifying language is required.

21. *False.* The actions which must be reported at the conclusion of closed session are those set forth in section 54957.1. There is no report required for some actions, e.g. completion of the evaluation of an employee, direction to legal counsel regarding items in litigation, etc.

22. *True.* A statement of how each member voted must be included in the report in open session. (See Gov. Code § 54957.1(a))

23. *False.* Prior to holding a closed session, the board must meet in open session and disclose any item or items to be discussed in the closed session. Disclosure may simply identify by reference the items listed by number or letter in the agenda. With regard to anticipated litigation, the facts or circumstances justifying the closed session must be publicly stated if not set forth in the agenda. This requirement does not apply if facts or circumstances are not known to the other potential parties to the litigation.

24. *Probably False.* The PRA would appear to require disclosure of such weekly bulletins although personnel information should be redacted.

CONCLUSION

In summary, representatives from our fifty states will find many common issues with the information that has been presented, and many will also find differences in the law in their jurisdictions; however, it is imperative that administrators, boards, and the public know the law, policies, and procedures that guide the deliberations and decision-making of their school boards.

The five concluding questions are designed to assist in complying with the public meeting law in any state.

1. What constitutes a meeting ?
2. How must the public be notified of the meeting and the business to be transacted?
3. What are the restrictions on the board as it conducts business?
4. What are the limits on the public's right to participate?
5. What are the state and federal statutes which affect the governance process and what policies and procedures need to be in place?

EDUCATION LAW ASSOCIATION
48TH ANNUAL CONFERENCE
NOVEMBER 14 – 16, 2002

TRENDS IN HIGHER EDUCATION COLLECTIVE BARGAINING

Jon E. Anderson
LaFollette Godfrey & Kahn
One East Main Street
P. O. Box 2719
Madison, WI 53701-2719
(608) 257-3911
(608) 257-0609 (Facsimile)

I. Representation Issues – Historical issues/current trends.

A. Faculty

1. NLRB v. Yeshiva University, 444 U.S. 672 (1980). (Faculty at private institutions are managers not protected by NLRA). (Affirms the determination of Second Circuit in 582 F.2d 686 (1978)).

2. University of Great Falls v. NLRB, 278 F.2d 1335 (D.C. Cir. 2002)

    a. Board ruled that employee or managerial status depended primarily on their authority over academic policy matters such as curriculum, grading systems, course scheduling, and admission standards. The UGF faculty made recommendations in many policy areas, but they would be managers only if "nearly all recommendations are routinely approved by the administrative hierarchy, without review." 325 NLRB No. 3 (1997)

    b. The university appealed the decision to court., The D.C. Circuit reversed the Board. The Court never considered the question of whether the professors were managers. The court concluded that the university was a religious institution and that the NLRB therefore lacked jurisdiction over it.

3. Manhattan College and Manhattan College Faculty Coalition, Case 2-RC-21735 (Nov. 1999). (Faculty have protected right to organize).

    a. [W]hile it is clear that the faculty has an obvious and pervasive influence on curricular and academic life at the College, their lack of majority representation on committees empowered to create academic policy militates against finding them managerial employees.

4. NLRB v. Catholic Bishop of Chicago, 440 US 490 (1990) (lay teachers in schools operated by a church to teach both religious and secular subjects not within jurisdiction of the NLRB).

5. David Wolcott Kendall Memorial School v. NLRB, 866 F.2d 157 (6th Cir. 1989) 130 LRRM 2334
(Court enforces order of NLRB requiring college to bargain with faculty as they are not excluded as managers).

6. NLRB v. Florida Memorial College, 820 F.2d 1182 (11th Cir., 1987) (Boards enforcement order granted. Faculty not managerial).

7. NLRB v. Lewis University, 765 F.2d 616 (7th Circuit, 1985) (Court denies enforcement. Finds faculty to be managers).

8. Appeal of Univ. Sys. Bd (N. H. Pub. Emp. Lab. Rels. Bd.), 795 A.2d 840 (2002) (Adjunct faculty at state college were not "temporary employees" and could collectively bargain).

B. Teaching and Research Assistants

1. Leland Stanford Junior University, 214 NLRB No. 82, 87 LRRM 1519 (1974).

    a. University research assistants were not employees for purposes of the NLRA. Their research, said the NLRB, was required for their graduate degrees, regardless of whether they were paid for their efforts.

2. New York University, 332 NLRB No. 111, 165 LRRM 1241 (Oct. 2000).

    a. Graduate students have a protected right to organize and bargain:

    > [W]e find there is no basis to deny collective bargaining rights to statutory employees merely because they are employed by an educational institution in which they are enrolled as students…. [U]nless a category of workers is among the few groups specifically exempted from the [National Labor Relations] Act's coverage, the group plainly comes within the statutory definition of "employee."

3. N.Y. v. N.Y. State Pub. Employment Rels. Bd., 586 N.Y. F.2d 662 (3d Dept. 1992) (Graduate students are "public employees" under state law).

4. Yale University, 330 NLRB No. 28, 162 LRRM 1393 (1999) (Withholding grades as a means of forcing the University to bargain not protected activity under NLRA).

C. Housestaff/Residents/Interns

1. Boston Medical Ctr. Corp, 330 NLRB No. 30, 162 LRRM 1329 (Nov. 1999) (NLRB overturns prior precedent and grants a unit certification to housestaff unit at Boston University Medical Center Hospital).

2. Comm. of Interns and Residents v. Pub. Health Trust, RC-95-060, 22 Fl. Pub. Employees Rep. P. 27230 (Sept. 1996) App. den. 688 So. 2d 928

(1997) (Housestaff at large public hospital have right to union representation).

D. AAUP Statement on Collective Bargaining:

The basic purposes of the American Association of University Professors are to protect academic freedom, to establish and strengthen institutions of faculty governance, to provide fair procedures for resolving grievances, to promote the economic well-being of faculty and other academic professionals, and to advance the interests of higher education. Collective bargaining is an effective instrument for achieving these objectives.

The presence of institutions of faculty governance does not preclude the need for or usefulness of collective bargaining. On the contrary, collective bargaining can be used to increase the effectiveness of those institutions by extending their areas of competence, defining their authority, and strengthening their voice in areas of shared authority and responsibility. The Association therefore affirms that faculties at both public and private institutions are entitled, as professionals, to choose by an election or comparable informal means to engage in collective bargaining in order to ensure effective faculty governance. Trustees and administrators are of course free publicly to question the desirability of collective bargaining, but they should not resort to litigation or other means having the purpose or effect of restraining or coercing the faculty in its choice of collective bargaining. Where a faculty chooses collective bargaining, the trustees and administration have a corresponding obligation to bargain in good faith with the faculty-selected representative and should not resort to litigation or any other means intended to avoid this obligation.

As a national organization which has historically played a major role in formulating and implementing the principles that govern relationships in academic life, the Association promotes collective bargaining to reinforce the best features of higher education. The principles of academic freedom and tenure, fair procedures, faculty participation in governance, and the primary responsibility of the faculty for determining academic policy will thereby be secured. Moreover, collective bargaining gives the faculty an effective voice in decisions which vitally affect its members' professional well-being, such as the allocation of financial resources and determination of faculty salaries and benefits. For these reasons, the Association supports efforts of local chapters to pursue collective bargaining. (Emphasis added).

E. AAUP Policy for Collective Bargaining Chapters:

1. Protect and promote the professional and economic interests of the faculty as a whole in accordance with the established principles of the Association.

2. Maintain and enhance within the institution structures of representative governance which provide full participation by the faculty in accordance with the established principles of the Association.

3. Obtain explicit guarantees of academic freedom and tenure in accordance with the principles and stated policies of the Association; and

4. Create orderly and clearly defined procedures for prompt consideration of problems and grievances of members of the bargaining unit, to which procedures any affected individual or group shall have access.

II. Systematic Preparation for collective bargaining.

A. Review of previous negotiations

1. Review issues from prior negotiations.

2. Review notes/minutes from prior negotiations.

3. Mark and index subject areas anticipated in upcoming negotiations.

4. Evaluate past successes/failures-tactics, timing, concessions, gains, barriers to speedy resolution.

5. Identify dominant personalities in recent negotiations – will their presence or absence be a factor in upcoming negotiations?

B. Review of experience during term of current contract

1. Review present contract to identify any provisions that require modification (e.g., flexibility in workday or workweek).

2. Review contract for any illegal provisions (consider laws prohibiting discrimination, federal/state legislation, recent court decisions) and propose changes, where necessary.

3. Solicit input from supervisors regarding needed changes in labor agreement.

4. Analyze grievance/arbitration cases during term of contract – consider subject matter of grievances, arbitration awards, etc.

5. Consider personnel problems during term of contract and develop proposals and/or strategy to deal with such problems.

6. Identify permissive subjects of bargaining.

C. Data collection (Internal)

1. Prepare wage chronology showing base, average & maximum wage rates over the last 10 years.
2. Prepare benefit chronology showing most significant benefit changes in the last 10 years.
3. Prepare summary of key economic factors.
4. Develop contract costing spreadsheet; calculate base year wage and fringe benefit costs.
5. Develop spreadsheet/chart showing distribution of employees.
6. Prepare age/service of matrix of unit.
7. Collect and review copies of any newly adopted policies, rules, etc. for discussion with Union or incorporation in upcoming contract.

D. Data collection (External)

1. Accumulate data on key economic indicators (e.g., rate of inflation, CPI, UC rates, etc.).
2. Review comparable wage/benefit data.
3. Review settlement terms of comparables.
4. Obtain both public and private sector data.

E. Development of negotiation strategy

1. Establish overall objectives for negotiations.
2. Establish approximate range of desired economic settlement.
3. Determine what, if any, changes in non-economic terms/contract language need to be made (e.g., adverse arbitration awards, costly work practices/schedules, misapplied provisions, grievance "hot spots," unproductive or wasteful contract requirements.)

    4. Prepare drafts of proposals.
    5. Assemble background data to support proposals.
    6. Develop opening statement.
    7. Identify critical dates.

F. Preparations regarding union proposals

    1. Anticipate Union proposals – investigate, research and obtain information on those which are new or significant.
    2. When Union proposal is received, analyze each demand; what does it mean, do we need more information, what are the immediate effects, what are long-term effects, how strongly does Union feel about proposal, how strongly does the membership feel about proposal; what prompted this request, is this a real solution to a problem, what are alternatives?
    3. Estimate cost of each economic proposal made by the Union.
    4. Prepare position on each proposal; initial, intermediate, final.
    5. Prepare statements, arguments, alternative solutions, counterproposals.
    6. Draft contract language, where necessary.

G. Communications

    1. Develop plan for communicating necessary information to/from supervisors.
    2. Develop plan for communicating with Board – method, frequency, amount of detail, need for clearances, etc.
    3. Identify person who will communicate with news media representatives and establish guidelines for limitation on information to be disseminated and communications objectives.
    4. Communicate regularly with your counterparts in similar institutions.

H. Bargaining representatives and arrangements

    1. Select management negotiating team.

2. Establish limits of authority/prioritize proposals.

3. Establish initial meeting date(s); coordinate with Union.

4. Prepare and send contractual reopening notices to the Union and required notices to WERC and official newspaper.

5. Determine location of negotiations meetings – room size, caucus rooms, availability for duration of negotiations; coordinate with Union.

6. Timing of negotiations sessions; coordinate with Union.

7. Make arrangements for support services (secretarial services).

8. Reconfirm authority as necessary.

I. Miscellaneous

1. Develop and monitor job action plan.

2. Develop ground rules.

3. Post-bargaining follow-up/training/in-service.

III. Key issues in collective bargaining.

A. Academic Freedom

B. Governance

C. Salaries

D. Intellectual Property

E. Health Insurance

F. Voluntary Early Retirement

G. Workload/Professional Responsibilities

H. Distance Education

IV. Health Insurance – A negotiation strategy.

A. Gather comparable data.

B. Do not add new benefits.

C. Educate your employees as to the increased cost of insurance premium/benefits.

D. Focus on the total package.

E. Demand/discuss insurance concessions:

1. Eliminate traditional indemnity plans

    a. Explore PPO's, PPN's, HMO's
    b. Obtain/retain the right to change carriers and/or self-fund
    c. Standards: "substantially equivalent" vs. "same as" or "equal to"
    d. Modify plan benefits

2. Limit/reduce employer contributions to premiums

    a. Flat dollar cap
    b. Percentage cap
    c. Require cost increases to be shared
    d. Implement Section 125 Plan

3. Implement/increase employee co-pays

    a. Increase deductibles
    b. Increase co-insurance
    c. Increase prescription drug co-pays
    d. Increase doctor/medical visit co-pays

4. Limit benefits for part-time employees

    a. Pro-ration of premiums
    b. Floor for eligibility

5. Limit benefits for retired employees

    a. Increase minimum age for early retirement
    b. Increase years of service required
    c. Limit number of years that health insurance will be provided
    d. Implement dollar cap rather than tying payments to premium rates
    e. Place caps on leave payout/conversion policies.

6 Obtain/retain non-duplication language

V. **Part-time/Adjunct Faculty.**

A. There has been a huge growth in the use of part-time/adjunct faculty.

1. The Vanishing Professor (1998, AFT)
2. Marching Toward Equity (2001, AFT)

B. Collective bargaining with part-time faculty is emotionally charged and extremely complex due to the competing interests both in and outside the bargaining unit.

C. A part-time faculty bargaining unit is made up of teachers who have a wide variety of reasons for teaching;

1. "Lone soldier"
2. "Patchwork quilt"
3. "Foot-in-the-door"
4. "Giving back"

D. Standards of Good Practice in the Employment of Part-time Adjunct Faculty (2002, AFT)

1. Compensation Standards (AFT)

a. Part-time/adjunct faculty should be paid a salary proportionate to that paid full-time tenured faculty of the same qualifications for doing the same work.

b. Part-time/adjunct faculty should receive prorated sick leave and pay for holidays and breaks.

c. Part-time/adjunct faculty should receive proportionate healthcare and pension benefits.

d. Part-time/adjunct faculty should be paid for holding office hours for student conferences.

e. In the absence of full pro rata pay, part-time/adjunct faculty who participate in institutional committee work should be compensated for doing so.

f. Part-time/adjunct faculty should have employment insurance available to them when they are not on the college payroll.

2. Terms of Employment (AFT)

   a. Part-time/adjunct faculty members should be hired initially with the same care and subjected to the same interview process as any other applicant to the department.

   b. A probationary period of time should be set for the evaluation of part-time/adjunct faculty members, after which they will achieve a form of job security.

   c. Upon successfully completing a probationary period, part-time/adjunct faculty should achieve a form of seniority.

   d. Once seniority is achieved, part-time/adjunct faculty should be subject to non-reappointment in only two circumstances: if the courses taught are not being offered, or for cause, utilizing all due process protections.

   e. Part-time/adjunct faculty should be permitted to order their own texts and design their own courses unless these are departmental decisions, in which case part-time/adjunct faculty should be invited to participate in the deliberations.

   f. Qualified part-time/adjunct faculty who have successfully completed a probationary period should be given preference in consideration for full-time positions in accordance with the requirements of the position, the needs of the department and the part-time/adjunct faculty member's seniority.

3. Standards of Professional Responsibility and Support (AFT)

   a. Upon initial appointment, part-time/adjunct faculty members should be oriented to the institution and to the department, to the curriculum and support services, to the institution's governance and structure, and to the department's expectations regarding the successful performance of their duties.

   b. To ensure adequate preparation time, class assignments should be made, whenever possible, using the same calendar and time line accorded full-time faculty.

   c. Part-time/adjunct faculty should be provided suitable office space and should have paid office hours to meet with their students.

d. Part-time/adjunct faculty who have achieved seniority and the job security that goes with it should be invited to participate in departmental meetings and other committees with voting privileges and should be compensated for doing so.

e. Part-time/adjunct faculty should have access to secretarial and technological support services necessary to the fulfillment of their responsibilities as well as to adequate supplies, to the library and to other campus privileges.

f. Part-time/adjunct faculty should have opportunities and financial support to participate in conferences and workshops for their professional development, to apply for grants and to participate in the institution's tuition support program.

VI. Conclusion.

A. Organizational activity is on the upswing.

B. Collective bargaining is here to stay.

C. New issues require new approaches and thinking.

MD5428_1.DOC

TECHNOLOGY IN PUBLIC EDUCATION: WHAT WILL THE QUEST FOR FAIRNESS AND EFFICIENCY DO TO INDIVIDUAL INTERESTS AND RIGHTS?

Kirk D. Strang
Davis & Kuelthau, s.c.
Ten E. Doty, Ste. 600
P.O. Box 1068
Madison, WI 53701-1068

I. **NATURE OF THE DILEMMA**: Public schools have to satisfy a variety of legal duties to prevent persons under their supervision from causing actionable harm to others. Sometimes, these responsibilities are mandated by force of law; sometimes they are driven by public expectations and perceptions. These duties implicate any number of services provided by public school districts, including the districts' roles as educators, employers, and caregivers. Yet satisfying these responsibilities (or, just as often, addressing related liability exposure issues) increasingly requires more active, and sometimes more intrusive means of monitoring the activities of employees and pupils. Further, school districts (and others) have greater technological means available to them to monitor the activities of others. As a result, as technology and other means of supervising and monitoring others' activities improves, the legal argument that schools can take or should have taken additional steps to prevent harm that may follow from those activities improves with it.

II. EVENTS AND FACTORS THAT MAY INFLUENCE PUBLIC PERCEPTIONS OF SCHOOLS RESPONSIBILITIES

A. **Columbine High School**: The tragic events at this Colorado high school stimulated a national discussion on school safety. The public's search for answers and its determination that events such as this must not be repeated prompted many to ask whether schools can do more to identify students who are or may become dangerous. This concern contributes to the public's expectation that schools should do more than punish wrongdoing, but should also gather intelligence to prevent harm from occurring in the first place.

B. **September 11, 2001**: The terrorist hijackings and bombing of the World Trade Center caused the nation to question whether accepted security measures can be relied on to provide for public safety and whether further compromises on privacy are essential to protect the public. In the months following the attacks, federal authorities were increasingly called upon to account for their intelligence prior to the attacks, and to establish that the attacks could not have been prevented.

C. **The Child Abductions Of 2002**: Although the impact of the past summer's events is not entirely clear (nor is it certain whether this phenomenon was statistically significant or a function of media reporting practices), parental fears have been exacerbated by the seemingly endless series of assaults, and compounded even further by the disquieting circumstances of certain cases (where children were abducted in or just outside of their homes). Parents' expectations that schools will police their facilities and will have painstakingly investigated employees' backgrounds will likely be even higher than before in light of these events. Moreover, the public tends to assume that information that is acquired by or is available through government sources is provided to or is easily obtained by other governmental authorities. As a result, the public is often surprised (to the point that it believes governmental authorities have been asleep at the switch) when one governmental entity, such as a school district, is not aware of information that another governmental agency, such as a law enforcement agency, has at its disposal regarding an individual or group.

D. **Public Perceptions Of The Resources and Capabilities Of Public Schools**: Many school officials view the last ten years as a time of limited resources and difficult budgetary decisions. However, the public at large often believes that public schools have considerable resources. Further, school officials generally report that the public believes that schools have a far greater capacity to supervise employees and pupils than may, in fact, be the case.

E. **Sexual Harassment Laws (And Other Employment Laws)**: As a general matter, schools will be required to take reasonable steps to prevent harassment, provide effective means for employees to seek relief, and take prompt remedial action when misconduct is found. In order to prevail, employment attorneys bringing actions against school districts must successfully assign responsibility to the school district for conduct that is often difficult for the district to detect in the absence of an affirmative report. As a result, plaintiffs of necessity must focus on what the employer did not do, and claim that if such steps had been taken, the harm at issue would not have occurred.

F. **The Definition Of "Privacy"**: Conventional understandings of "privacy" are not always consistent with established legal principles on the subject. Monitoring through technological means (as well as other forms of monitoring and surveillance) is permissible in a variety of circumstances. This means that schools often cannot raise the defense that monitoring would have been an unlawful invasion of privacy and may have to defend a decision not to monitor particular communications, a failure to consider monitoring altogether, or a failure to apply more invasive monitoring protocols which, if done, would allegedly have detected the offending conduct and placed the school district in a position to stop it. This problem is compounded by the fact that school districts often place students and staff on notice that certain forms of communication are not private and may be monitored, heightening the expectation that prophylactic monitoring will occur.

III. LEGAL DUTIES THAT CAN ENCOURAGE HEIGHTENED SUPERVISION AND MONITORING:

A. **Pupil Discipline**: School districts generally have broad authority to sanction pupil conduct that poses a danger to others and, again generally speaking, conduct that is considered dangerous includes a variety of behavior. Thus, although school districts generally are inclined toward remediation (in order to continue to provide educational and support services to students that present discipline problems), school districts are under increasing pressure to remove offenders from the student population through suspension or expulsion, and understand that their failure to do so will likely result in claims that the district failed to take steps that were well within its power to prevent harm to third persons.

B. **Title IX**: School districts can be held liable in certain circumstances for, e.g., one pupil's harassment of another pupil, provided that the district showed deliberate indifference to the offending conduct. Because it is often difficult for claimants to prove that this standard has been satisfied with the proverbial "smoking gun" (e.g., proof that express complaints were systematically disregarded), claimants are increasingly resorting to proof that districts are deliberately choosing not to employ means at their disposal which, if used, would have prevented the conduct in question.

C. **Negligence Principles**: (negligent hiring, supervision, and retention): Negligence principles implicate almost every aspect of a school district's operations, from parking lot supervision to background checks of job applicants. Generally, negligence principles will require that a school district exercise due care to prevent foreseeable harm. The public has high expectations (sometimes unreasonably so) that school districts can control that conduct of all persons under their supervision or in their facilities, and appears to treat most conduct as foreseeable and preventable. Technological means of supervision are often "required" by the demands of the public and the specter of litigation, given the availability of technological remedies, its uses by the same school district in other contexts, and its perceived cost effectiveness when staffing constraints make increased supervision by personnel infeasible.

D. **Sexual Harassment Laws (Employment)**: School Districts have an affirmative duty to take prompt remedial action to address sexual harassment and are required to take reasonable steps to prevent harassment from occurring. As technological means such as e-mail provide employees with another means to harass other employees, districts are under increased pressure to monitor e-mail communications in order to prevent or respond to inappropriate communications.

IV. RELEVANT LEGAL AUTHORITY:

A. Federal Electronic Communications Privacy Act (1986):

1. Scope of the ECPA:

a. The Federal Electronic Communications and Privacy Act (ECPA) regulates oral and wire communications. The ECPA's protections extend not only to "basic" wire, oral, and written communications, but also to newer means of communications, i.e. electronic mail, voice mail and bulletin boards, computer-to-computer communications, and remote computer services.

The ECPA applies to "aural" or "electronic" communications. Therefore, whether or not a particular video surveillance system includes audio surveillance may be a key issue in determining whether or not an employer will be bound or liable under the ECPA. For example, in United States v. Torres, 751 F.2d 875, 884-85 (7th Cir. 1984), the court recognized that silent videotaping does not fall within the letter of the ECPA. Similarly, in Thompson v. Johnson County Community College, 930 F. Supp. 501 (D.C. Kan., 1996), a Federal District Court in Kansas ruled, as a matter of law, that a defendant community college was entitled to summary judgment because silent video surveillance falls outside the scope of the ECPA.

b. The ECPA covers two types of electronic communications:

(1) In-transit communications.

(2) Stored communications.

c. The ECPA provides for a civil cause of action.

2. **Interception of "In-transit" Electronic Communications.**

The ECPA generally prohibits the unauthorized interception of electronic communications. However, the ECPA does contain exceptions to this general rule:

a. The business use exception. This exception allows employers to monitor telephone calls if the monitoring is done for a legitimate business purpose.

b. The prior consent exception. This exception allows employers to intercept or record communications between employees if any party to the conversation has consented to its interception.

c. The reasonable expectation of noninterception exception. An individual alleging an unlawful interception of oral communication must show that they had a reasonable expectation of noninterception of such communications.

3. Access to "Stored" Communications.

The ECPA also prohibits unauthorized access to stored wire and electronic communications, including stored messages in voice mail, e-mail and internet accounts. There are exceptions to this ECPA provision as well:

a. The provider exception: The "entity providing the electronic communications service" to the employee is exempted from this prohibition against access and disclosure of stored communications.

Example: In Bohach v. The City of Reno, 932 F. Supp. 1232 (D. Nev. 1996), the defendant employer, the City of Reno Police Department, provided its employees with a completely "private" or "closed" communications system, which it owned and operated. In that case, the court considered the city the "provider," exempting the city from the ECPA, and allowing the city to access its employees' electronic communications. However, in employment situations where an employer simply contracts with an outside service, such as AT&T, CompuServe or MCI Mail to provide e-mail, voice mail and Internet access for its employees, the employer may not be considered a "provider" of the service.

The officers under investigation filed a lawsuit claiming violation of their Fourth Amendment right to privacy and various federal wiretapping statutes.

The court held that: (a) the officers did not have a reasonable expectation of privacy because the officers knew that their messages were recorded and logged on the department's network n the ordinary course of the department's business (messages were recorded "for a variety of reasons: to make sure that their dispatches are accurate, to verify information and to keep a log of emergency and non-emergency calls"); (b) there was no unlawful interception in violation of the ECPA because the pager messages were not "intercepted" at the time of transmission, because the system on which the pages operated simply forwarded the message through a computer system; the messages were only later recorded and stored on the department's computer system for logging and archival purposes; and (c) the retrieving of stored messages did not violate the ECPA because the statute does not prohibit the retrieval of messages from a supplier's own system (the department supplied and maintained the system, so the department could do what it wished with the recorded messages).

b. Consent by the user. Consent may be procured from employees explicitly, or implicitly through policies.

Example, Briggs v. American Air Filter Co., 630 F.2d 414 (5th Cir. Ga. 1980): an employee brought a claim for invasion of privacy where the employer recorded workplace phone conversations. The court upheld the employer's action because the recording was done on an extension and because the specific purpose of listening was business related: to ascertain the employee was only using the phone for business.

B. Employee Polygraph Protection Act, 29 U.S.C. § 2001 et. seq. (EPPA):

The EPPA makes it illegal, with limited exceptions, for employers to use lie detector tests. The significant exception is for ongoing investigations involving economic loss or injury to the employer's business where there is a reasonable suspicion of workplace theft, embezzlement, misappropriation, and in certain other cases. U.S.C. § 2006(d). *See* Veazey v. Communications & Cable of Chicago, 194 F.3d 850, 858 (7th Cir. 1999).

Disclosure of test results also is generally prohibited. *But see* Long v. Mango's Tropical Café, 972 F. Supp. 655 (S.D. Fla. 1997) (bar owner who revealed discharged employee's polygraph results after the employee sued did not violate EPPA).

C. Litigation Involving Privacy Rights And Technology:

1. Telephone/Voicemail.

In Deal v. Spears, 980 F. 2d 1153 (8th Cir. 1992), the defendants owned a store adjacent to their mobile home that shared a phone line with their mobile home. After their store was robbed, the defendants installed a recording device on the phone line in their home to monitor the calls of one of their employees who they suspected of committing the robbery. The employee was warned that due to her excess personal calls they might monitor her calls, but did not inform her of the recording device. The Eighth Circuit Court of Appeals held that the employee did not consent to the monitoring because defendants did not inform the employee that they were monitoring her calls, they merely warned her that they might. The court also held that the defendants did not meet the business exemption because the recording device they used had been purchased at Radio Shack, and therefore, had not been supplied by the phone company.

In Watkins v. L.M. Berry & Company, 704 F.2d 577 (11th Cir. 1983), employee calls were ostensibly monitored to help improve sales techniques. The company had a policy, however, that it would only monitor personal calls long enough to determine that they were personal. The employee brought suit against her employer because it had monitored one of her personal calls in its entirety. The Eleventh Circuit Court of Appeals held that the employer did not meet the business exemption because listening to personal calls was not in the employer's ordinary course of business.

Amati v. City of Woodstock, 176 F.3d 952 (7th Cir. 1999). The court concluded that 63 plaintiffs, whose conversations over a police department telephone line were tape recorded, could not prevail under an invasion of privacy claim.

Dorris v. Absher, 179 F.3d 420 (6th Cir. 1999). Plaintiffs were awarded $160,000 against their supervisor for violation of their privacy when the supervisor surreptitiously tape recorded their conversations. The court held that the plaintiffs had reasonable subjective and objective expectations of privacy, because the employer did not have any policies that cautioned that their conversations might be tape recorded.

2. **E-Mail**.

Smyth v. Pillsbury Co., 914 F. Supp. 97 (E.D. Pa. 1996). Pillsbury maintained an electronic mail system in order to promote better internal communications between its employees. Pillsbury repeatedly assured its employees that any e-mail communications would remain confidential. Pillsbury further assured its employees that such e-mail transmissions could not be intercepted and used by the company as grounds for termination or reprimand. The company intercepted plaintiff's private e-mail messages and terminated him for what it deemed inappropriate and unprofessional comments over the e-mail system. Plaintiff sued for wrongful discharge when it terminated him for transmitting what the company deemed to be inappropriate and unprofessional comments over its e-mail system.

The court granted Pillsbury's motion to dismiss based on its finding that the plaintiff employee did not have "a reasonable expectation of privacy in e-mail communications voluntarily made by [him] to his supervisor over the company e-mail system notwithstanding any assurances that such communications would not be intercepted by management. In addition, the court noted that "by intercepting such communications, the company is not, as in the case of urinalysis or personal property searches, requiring the employee to disclose any personal information about himself or invading the employee's person or personal effects."

In Harley v. McCoach, 928 F. Supp. 533 (E.D. Pa. 1996), an employer had to defend a lawsuit based on sexual harassment involving the use of e-mail. In addition to a large amount of sexual conduct, the court reviewed an e-mail message sent to Plaintiff identifying her as "Brown Sugar." After the plaintiff complained to her employer, the employer instituted remedial measures, which included removal of e-mail capability from the workplace. Despite the fact that the employer took away e-mail privileges, the court found for the employee.

In Strauss v. Microsoft Corp., 814 F. Supp. 1186 (S.D.N.Y. 1993), one of the defendants sent an e-mail message to all of his staff referring to a female employee as "spandex queen," and referring to himself as president of the "amateur gynecology club." In addition, the same defendant forwarded to a male staff employee an e-mail message containing a news report on Finland's proposal to institute a sex holiday and an e-mail containing a parody of a play entitled "A Girl's Guide to Condoms." Those messages were then forwarded to the plaintiff. Despite the fact that some of the messages were not sent directly to the plaintiff, it was the distribution of the information that the plaintiff was eventually made aware of that led the court to find for the employee.

3. Internet.

Key cases involving internet monitoring have involved government workplaces and an employee's Fourth Amendment rights to be protected from unreasonable searches. Whether the monitoring or search is in violation of the employee's Fourth Amendment rights turns on whether the employee had an expectation of privacy. Where the employer has a known policy allowing monitoring, the courts have concluded that the employee does not have a privacy expectation.

United States v. Simons, 206 F.3d 392 (4th Cir. 2000). A former employee was convicted for receiving and possessing child pornography after he had downloaded more than 1,000 files that contained pornography. The employee challenged the search of his computer on the grounds that it was an unreasonable search in violation of the Fourth Amendment.

The court concluded that there was no violation because the employee lacked a legitimate expectation of privacy in the files he had downloaded from the internet, because the government had a policy that "clearly stated that FBIS would 'audit, inspect and/or monitor' employees' use of the Internet, including all file transfers, all websites visited, and all e-mail messages, 'as deemed appropriate.'"

Muick v. Glenayre Electronics, -- F.3d --, 2002 WL 181726 (7th Cir. 2002). An employee alleged that the employer violated his Fourth and Fifth Amendment rights (and rights under Illinois law) when it seized his laptop computer at the request of federal agents and held the computer until such time as the government obtained a search warrant to determine whether the employee possessed child pornography. The employer "announced that it could inspect laptops that if furnished for the use of its employees, [the announcement] destroyed any reasonable expectation of privacy that [the employee] might have had ...." Consequently, the employee did not have a federal constitutional cause of action against his employer.

4. **Video Surveillance.**

Video surveillance in public and open spaces is generally permissible. As the court noted in Vega-Rodriquez v. Puerto Rico Telephone Company, 110 F.3d 174 (1st Cir. 1997), "no legitimate expectation of privacy exists in objects exposed to plain view as long as the viewer's presence at the vantage point is lawful." The court stated that an employer may monitor areas that are in plain view within an open work area.

Video surveillance in what are arguably "private" areas may implicate privacy interests. *See, e.g.*, Cramer v. Consolidated Freightways, Inc., 225 F.3d 683 (9th Cir. 2001) (employee could bring a state law claim against its employer where the employer installed two-way mirrors (and video cameras) in its employees' restrooms to facilitate detection of employee drug-users, a use of surveillance equipment that was arguably illegal under California law). *See also*, Doe by Doe v. B.P.S. Guard Services, Inc., 945 F.2d 1422 (8th Cir. 1991) (cause of action was stated where surveillance was made of a dressing room, even though none of the plaintiffs was viewed in state of undress).

In Meche v. Wal-Mart Stores, Inc., 392 So. 2d 544 (1997), employees of a Wal-Mart store brought an invasion of privacy claim. Unbeknownst to the owner of the store, a security guard had placed a video camera in one of the employee unisex restrooms. The court dismissed that claim because the employees could not establish that any footage was actually taken of any employees using the restroom. The court stated that "at best, we consider the facts herein to have established an attempted invasion of privacy," which is not an actionable claim. The court also dismissed a sexual harassment claim, partly because the bathroom was unisex and the incident was not aimed at any one gender.

V. NEGLIGENCE THEORIES THAT MAY IMPACT ON SCHOOLS' USE OF MONITORING TECHNOLOGY

A. **Origins Of The Duty**: Courts often cite the Restatement (Second) of Agency as authority for the doctrine of negligent supervision. That section states:

213 Principal Negligent or Reckless

A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:

1. in giving improper or ambiguous orders or in failing to make proper regulation;
2. in the employment of improper persons or instrumentalities in work involving risk of harm to others;
3. in the supervision of the activities; or
4. in permitting, or failing to prevent, negligent or other tortuous conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

B. **Elements**. In order to state a claim for negligent supervision; a plaintiff bears the burden of proving the following elements:

1. The defendant owed a duty to the plaintiff. In general, schools have a duty to exercise reasonable care, in view of all the circumstances, in regulating the actions of individuals who might pose a threat of injury to others.
2. The school district knew or should have known that the individual posed an unreasonable risk and did not address that risk.

a. The plaintiff must prove the school district had actual or constructive knowledge of unfitness or risk.

b. A plaintiff may provide actual knowledge by showing the school district possessed evidence of unfitness (e.g., past performance reviews, disciplinary notices), or by showing the employer personally witnessed behavior that would apprise it of risks.

c. A plaintiff may prove constructive knowledge by showing a reasonable investigation would have alerted the school district to risks posed by another individual of the employee's fitness.

VI. USE OF TECHNOLOGY TO MONITOR STUDENT AND EMPLOYEE ACTIVITIES:

Relevant decisions indicate that privacy interests may be protected in certain circumstances involving private telephone conversations. However, employee and student use of e-mail and the internet is clearly subject to monitoring. Further, the use of video surveillance in areas that are not subject to special privacy protections (buses, halls, parking lots, playgrounds, and classrooms) is permissible. Consequently, school officials appear to have broad authority to employ such technology to prevent harm to students and employees under their supervision, and may be under increasing pressure to do so to avoid liability exposure under negligence and other theories of law.

The kinds and degree of monitoring that a school district chooses to engage in will, of course, be influenced by school districts' philosophies on privacy, budgetary considerations, and a series of factors deemed relevant to risk analysis. Nevertheless, to the extent that technological monitoring increasingly becomes a practical necessity, certain strategies appear supportable.

A. E-Mail And Internet Usage Monitoring:

1. Acceptable use policies must:

- ❖ Place employees on notice that e-mail and internet activity will be monitored and is not private.
- ❖ State that monitoring cannot detect all conduct that may violate harassment policies or other rights of staff/students, and therefore that the district depends upon timely reporting by users of the system to prevent such activity.

- Instruct staff/students on appropriate methods for preserving evidence of offending conduct.
- Identify conduct that violates acceptable use standards.
- Provide for remedial measures (including revocation) when violations occur.

2. **Procedures to consider**:

- Use blocking technology to prevent certain materials or content from being transmitted.
- Place blocking restrictions on pictorial transmissions.
- Require passwords for logging on and provide that users must log on only at specified terminals (and when this is not permissible, for check in procedure logging use of another terminal).
- Use servers that allow for downloading the contents of a particular termination from another location.
- Provide for spot checks of e-mail messages that do not meet criteria for business usage.
- Provide for e-mail messages to be transmitted for review when certain address book captions are used and when messages are forwarded containing multiple prior addresses.
- Establish a SMTP gateway to filter unwanted e-mail before it hits the server or use mailboxes.

B. Video Cameras:

- Camera use may need to be considered in certain areas where supervision cannot reasonably be maintained through the use of personnel:
    - -- School buses
    - -- Hallways that are more remote or low traffic
- School districts must have a discussion about video surveillance of playgrounds and parking lots which, though more common in certain areas, is not used at all in many schools around the nation. On the one hand, video surveillance can provide general deterrence (though the primary value of most systems is investigative, rather than preventative) and can potentially capture behavior that might otherwise not be detected. On the other hand, video surveillance in these settings is less revealing than many believe (due to the lack of detail that wide field shots provide and the lack of context for recorded events, even for behavior that can be observed), and can actually support liability claims against school

district. Further, video camera systems that will truly deter undesirable behavior tend, at least in the view of some, to be more ominous, raising separate issues concerning the climate that the school district wishes to promote.

- Decoy cameras should be considered for deterrent effect in circumstances where school districts decide to use video taping.
- General notice should be given of general video camera usage to maximize their deterrent effect and to act as a hedge against ill-founded claims of invasion of privacy.

C. **Audio Surveillance**:

- Monitoring incoming calls from the public.

D. **Metal Detectors**:

- School districts must provide a basis for adopting metal detector strategies as well as procedures for their use. The California Attorney General's office has suggested, e.g., that school officials identify incidents involving weapons or a developing patterns of weapons possession or usage as a predicate for adopting such policies. Such citations will, however, stimulate liability claims if a decision is made not to adopt inspection procedures in response to increased possession and/or usage of firearms. The Synopsis provided by the California Attorney General's office (at 92 Cal. Att'y Gen. Op. 201 (Oct. 6, 1992)), also suggests the following:
    - Advance notice of the search;
    - Request that students empty their pockets of all metal objects;
    - Request a second walk-through when the detector is activated;
    - Use a hand held detector to identify the source of the read if a second activation occurs;
    - If the activation is not explained, the search may need to be expanded; if no less restrictive means exist, a pat down search may be required;
    - For any greater intrusion, the student may be asked to proceed to a private area;
    - Any expanded search, such as requests to open purses or backpacks, could be conducted by school officials of the same sex as the students searched.

- School districts must determine whether fixed station and/or hand held metal detectors are to be used.
- Personnel using hand held metal detectors must be trained in equipment operation and in avoiding intrusive behavior that might give rise to privacy claims.
- Use of police officers as part of metal detection strategies should be discussed; such use may be permissible when the officer is acting as a school official, but may constitute an unlawful search (and seized evidence subject to suppression) in other circumstances. *See* People v. Parker, 284 Ill. App. 3d 860, 672 N.E. 2d 813 (1996) (student attempting to enter school turned to leave when he was stopped by a police officer and required to go through a metal detector; the gun that was seized was suppressed). In addition, because school officials' capacity to search in response to a positive metal detector read is not unlimited, employees must have the capacity to respond to high stress situations when students do/do not empty their pockets.

E. General Risk Management Procedures

Teacher Sexual Misconduct:

Discerning the Difference Between a Classroom "Crush" and a Career Catastrophe

Education Law Association
48th Annual Conference
November 14-16, 2002
New Orleans, LA

Mary Ann Manos, Ph.D.
Associate Professor
Director, Bradley University Gifted and Talented Institute
Bradley University
206 Westlake Hall
Peoria, Illinois
61625
mmanos@bradley.edu

Mary Ann Manos, Ph.D.
Associate Professor
Director, Bradley University Gifted and Talented Institute
Bradley University
206 Westlake Hall
Peoria, Illinois
61625
Phone: (309) 677-2614
Fax: (390) 677-2652
EMAIL – mmanos@bradley.edu

Teacher Sexual Misconduct – Discerning the Difference Between a Classroom "Crush" and a Career Catastrophe

Enter the terms "school and lolita "into a web search and you will find hundreds of recent newspaper headlines. Enter the same terms into a search of available education books and you will fail to find a single volume. Yet nothing can end a teacher's career faster than allegations of sexual misconduct. Headlines from the UK, the United Sates, Australia, and Canada scream second-hand reports and rumors to the public. On the other hand, teachers, counselors and school administrators working with adolescents, may not even consider student intent, experience or knowledge level in regard to the "classroom crush." Early adolescents, surrounded by sexual messages in the media, often bring fantasies into the public and private school classroom. Many unassuming teachers are unprepared to deal with inappropriate actions and comments from students.

The education profession fails to train classroom teachers to recognize and redirect inappropriate, unwarranted romantic expressions or behavior by students toward their teachers. Teacher education programs fail to mention the subject of unwanted romantic behavior by adolescents in the classroom. Why? Nothing else can end a career in less than 5 minutes. Nonetheless, many school districts wait too long to provide adequate training in the identification and redirection of inappropriate student behavior.

Additionally, school administrators and school board members may indeed find themselves in a highly-volatile public situation with no response plan. The actions taken within hours after an allegation of teacher sexual misconduct will either thwart punitive court damages or fuel them. Many unprepared, misinformed school administrators overact to emotionally-charged situations by suppressing allegations of teacher sexual misconduct. Selecting a path of "deliberate indifference" will prove unwise. How can a school district bolster community trust, maintain high professional and ethical standards and meet all legal mandates in response allegations of teacher sexual misconduct?

Who is Lolita? What impact will she (or he) have upon a teacher's career? Educators are public figures who hold a unique position of trust and authority. The mere hint of sexual misconduct may have a devastating effect on a teacher's career. Such a stigma can result in the loss of employment (even if the teacher is officially cleared of all charges.) This session will provide a working definition of the "Lolita complex", indicative behavior, and danger signs that may proceed an allegation of misconduct. Additionally, School-sponsored activities and locations that could prove troublesome will be described. This session will conclude with law citations and news reports that correlate with information presented.

1. Lolita in the Classroom
    a) Definition of the Lolita complex (male and female)
    b) Societal influences
    c) Behavioral signs of an "unwarranted romantic attachment by the student"
    d) Examples – elementary, middle and high school.

2. Sexually Aggressive Children and Youth (S.A.C.Y.)
    a) Legal definition – Section 504
    b) Privacy issues
    c) "Grooming" behavior
    d) Classroom placement plan

BEST COPY AVAILABLE

    - e) Examples – elementary, middle and high school

3. Danger Zones
    - a) Extra-curricular activities
    - b) Field trips
    - c) Transporting students in private vehicles
    - d) Invitations to family residences
    - e) Classroom seclusion
    - f) Elementary, middle and high school

4. Documentation of seductive behavior
    - a) Written notes and privacy issues
    - b) Parent communication

5. School personnel and privacy Requirements
    - a) Notify supervisor
    - b) Notify counselor
    - c) Share with colleague

6. Conference with student
    - a) Three-way conference
    - b) Change class setting
    - c) Notify parents

7. School Policy Issues
    - a) Approved school policy vs. custom
    - b) Teacher suspension with or without pay
        1. Written notice requirements for personnel file
        2. Verbal notice requirements for personnel file
    - c) Evidentiary hearings
        1. Right to hear witness accounts
        2. Written complaints from parents
        3. Polygraph results of teacher (voluntary)
    - d) Notification of child protective services
    - e) Constructive discharge

    (Create working conditions so intolerable as to force a reasonable employee to resign)

8. Ethical issues
    - a) In loco parentis
    - b) Teacher as exemplar – community standard
    - c) Behavior in "official capacity"
    - d) Educational Professional Standards Board
    - e) Legal standards "shocking to the conscience"
    - f) Slander

9. Professional Issues
    - a) Loss of teaching credentials
    - b) Grievance procedure set forth though collective bargaining
    - c) Property right of continued employment – protected liberty
    - d) Pre- and post-deprivation due process
    - e) Privacy right

10. Suspected child abuse
    a) Initial concern
        1. Student notes
        2. Student comments
        3. Faculty surmise
        4. Anonymous phone calls
        5. Rumors
    6 . Parent compliant/contact
    b) School administrators/personnel who fail to report
        1. Official misconduct
        2. Obstruction of justice
        3. Deliberate indifference
        4. Legal standard – "Fostering an environment for child abuse to exist."

11. Investigating agencies
    a) Child protective services
    b) Local police – probable cause
    c) School district officials

12. Arrest
    a) Grand jury indictment without defense attorney
    b) States attorney
    c) Arraigned in court
    d) Public notification – community reaction
    e) Public notification – community reaction

13. Court Action
    a) Protection of victim and witness
    b) Jury will credit the victim's own perception over the perception of the teacher and/or witness
    c) Preponderance of evidence
    d) Loss of teaching credentials
    e) Stigma of criminal charge
    f) Statute of limitations

14. Constitutional Rights Violations Most commonly Found in Sexual Misconduct Civil Suits
    a) Title 9 – Section 1983 violations
    b) Violations of civil rights
    c) Denial of equal protection
    d) Denial of free access to courts
    e) Denial of due process
    f) Right to safety in person and bodily integrity

15. State Rights Violations
    a) Tort liability – negligence
        1. Failure to adequately train employees
        2. Negligent hiring
        3. Negligent supervision
        4. Gross and deliberate indifference
    b) Color of law
    c) "Shocks the conscience" standard

16. Regaining Professional Credibility
    a) Polygraph tests

b) Civil action / slander of reputation
c) Hearings before Educational Professional Standards Board
d) Public statements – legal representation

All school districts must be prepared to face the possibility of a false allegation of teacher sexual-misconduct. School district administrators must plan for the eventuality of a false allegation of teacher misconduct and be prepared to meet legal guidelines, as well as professional and ethical standards of conduct. As a part of their yearly objectives, building principals must provide effective in-service opportunities that include the following:

a. An overview of problematic teacher/ student behavior.
b. Legal mandates for sexual harassment prevention.
c. Proactive strategies for classroom teachers, school councilors and school administration.
d. Clear explanation of school board policy and collective bargaining time lines.
e. The name of resource personnel who may be contacted on an individual's basis for further information.
f. Professional teacher association information regarding teacher indemnification.
g. Discussion groups that facilitate active problem-solving with fellow professionals.
h. A buddy system for faculty- a colleague who will provide support and guidance in daily classroom situations (especially needed for first year teachers).
i. A district-wide system of documentation for teachers' professional notes regarding disciplinary actions.
j. Access to community legal experts on sexual-abuse allegations.
k. Access to trained Title IX office within the district.

All education professional and paraprofessionals are called to a higher standard of conduct. The preamble to the National Education Association Code of Ethics of the Education Profession beautifully expresses the public trust placed upon educators. "The educator believing in the worth and dignity of each human being, recognizes the supreme importance of the pursuit of truth, devotion to excellence and the nurture of democratic principles." The sad conclusion to a false allegation of misconduct is that often the teacher and his/her career are expendable, not even worthy of time to seek out the truth.

In fact, there is no way for a teacher falsely accused of sexual misconduct to regain professional reputation, short of pursuing a civil suit for defamation of character. Guilt or innocence must not be a matter for community conclusion. In every allegation, some popular opinion will judge the teacher innocent, while others are convinced of their guilt. A sense of fairness must permeate school district responses to allegations of teacher sexual misconduct. Fairness to students and teachers is critical. No true teacher wants to harm students, but no teacher wants to be one false allegation away from losing their career, livelihood and reputation.

Related Court Cases

In re Heather B. Md. No.90, Sept. Term 2001, June 7, 2002.

Peaster Independent School District v. Glodfelty, Court of Appeals of Texas, Second District, Fort Worth 63 S.W. 3rd 1 2001:Tex. App Lexis 3105

Tweedall v. Fritz, United States District Court of the Southern District of Indiana, Evanville Division 987 F.Supp. 1126:1997 U.S. Lexis 207066; 77 Fair Empl. Pra. Cas. (BNA) 1777.

Wilson v. Webb, U.S. Court of Appeals for the Sixth Circuit, 2000 U.S. App. Lexis 23585

StoneKing v. Bradford Area School District 856 F.2nd 594 (3rd Cir.1988).

Doe v. Board of Education of Hononegah Community High School, District #207, 833 F.Supp 1366: 1993 U.S. Dist.

City of Canton v. Harris, 489 U.S. 378, 388 109 S.Ct. 1197, 1204, 103 L.Ed. 2nd 412

Armstrong v. Lamy et al, 938 F. Supp. 1018:1996 U.S. Dist.

Garcia by Garcia v. Miera, United States Court of Appeals, 1987, 817 F. 2nd 650.

Doe v. Berkley County School District, United States District Court for the District of South Carolina, Charleston Division 989 F. Supp 768: 1997 U.S. Dist. Lexis 21100.

Chicago Public Schools' Promotion Policy: Potential Due Process Violations and Title VI Implications

Sarah Helvey
Judith Risch, J.D., M.S.

University of Wisconsin – Madison
Department of Educational Administration
Education Sciences Building
1025 West Johnson Street
Madison, WI 53706

Background

- Recent emphasis on accountability in education has resulted in high stakes testing policies to measure the achievement of:
    - Individual Students - for tracking, promotion, and graduation purposes, and
    - Schools – now mandated in the reauthorization of the Elementary and Secondary Education Act (ESEA), aka the No Child Left Behind Act of 2001 (for grades 3-8).[1]
- High Stakes Testing of individual students is widespread:
    - In 2000, the Council of Chief State School Officers reported that 19 states had a policy requiring students to pass an exit exam in order to receive a high school diploma. Nine states reported being in the development phase of such a policy. [2]
- Legal Concerns related to high stakes testing include:
    - Equal Protection and Title VI of the Civil Rights Act of 1964 (Title VI)
    - Due Process
    - Individuals with Disabilities Education Act (IDEA)
    - Issues surrounding English Language Learners
    - ✓ **This paper will be limited to discussion of Equal Protection, Title VI, and Due Process as it relates to high stakes testing. In particular, this paper will examine one particular high stakes testing program, a grade promotion policy which utilizes a standardized examination as the primary basis for retention decisions.**
- Major Legal Precedents:
    - *Debra P. v. Turlington* [3]
        - This case involved a challenge to a Florida legislative amendment to the Educational Accountability Act of 1976, which required that public school students pass a functional literacy exam in order to receive a high school diploma.[4]
        - The plaintiffs (students who did not pass the exam) argued that the test-for-diploma scheme perpetuated the effects of prior discrimination, denying them equal protection of the law, and that the test-for-diploma scheme was unfair because the test was invalid and the diploma sanction was imposed too hastily, denying them due process.[5]
        - The plaintiffs argued that there was insufficient time (2 years) between the initiation of the program and its implementation was not enough time to successfully match the curriculum and instruction to the test.[6]

  - The plaintiffs also argued that there were other alternatives to the testing scheme, such as longer-term remediation, more time between implementation and test administration, and phasing in the state objectives.[7]
  - The plaintiffs also argued that the test violated the equal protection clause because 57 percent of the (12th grade) students who failed the test were African-American, while African-Americans constituted only about 20 percent of the student body.[8]
  - The district court issued a four-year injunction on the use of the test as a diploma requirement until no students taking the test had attended school in the non-unitary (segregated) system.[9]
  - In 1983, after lifting the injunction, the Court of Appeals remanded the case for a determination as to whether the test was content valid – whether it measured what the students were being taught in class. In this decision, the appellate court reasoned that "if the test is not fair, it cannot be said to be rationally related to a state interest."[10] The Court of Appeals also examined the equal protection claim, clarifying that in order for the district court to prohibit the use of the test as a diploma sanction, it must be determined that the disparate impact was caused by "past purposeful segregation or its lingering effects."[11]
  - The district court found that the defendants met their burden of proving that the test was instructionally valid (skills were included in the official curriculum and the "majority of teachers recognize them as being something they should teach").[12] Furthermore, the court was satisfied by the fact that the defendants had in place procedures for review of instructional programs, as well as remediation for students who did not pass the test.[13]
  - The district court dismissed the equal protection claim, essentially asserting that – twelve years after becoming unitary – Florida students received the same textbooks, curricula, libraries, and attendance requirements and, thus, a test like the one used (i.e. one that is objective and standardized) could instead contribute to the eradication of past racial inequalities.[14]
- *GI Forum v. Texas Education Agency*[15]
  - In January of 2000, nine Texas high school students who did not pass the state high school graduation exam, the Texas Assessment of Academic Skills (TAAS), brought suit against the Texas Education Agency, alleging that the TAAS was unconstitutional on the grounds that it violated their due process rights by withholding their high school diploma.[16]

        - The students also argued that the TAAS violated Title VI of the Civil Rights Act of 1964 because the test had disparate effects for minority students.[17] The court noted that, "In every administration of the TAAS since October,1990, Hispanic and African American students performed significantly worse on all three sections of the graduation test than majority students.[18]
        - The U.S. District Court for the Western District of Texas found that the TAAS did not violate the due process clause because the Texas Education Agency sufficiently showed that its testing policy was in line with established state standards designed to "reflect an insistence on standards and educational policies that are uniform from school to school."[19] The due process claim was dismissed because it was found that the state standards mandated that the test match the state's curricular goals.[20]
        - Furthermore, the Texas Education Agency argued successfully that, although disparate effects on the TAAS did exist, the discrepancy in passing scores was improving for minority students, and that the scores of minority students in Texas are higher than that of minority students nationally.[21]
        - Consequently, because the plaintiffs were unable to show that a "nexus" existed between the disparities and the TAAS, and because they "failed to prove that the policies are unconstitutional, that the adverse impact is avoidable or more significant than the concomitant positive impact, or that other approaches would meet the State's articulated legitimate goals," the court found the TAAS permissible as a graduation requirement.[22]
- Equal Protection/Title VI and Due Process
    - Equal Protection/Title VI
        - With regard to high stakes testing, three claims have typically been made to argue that tests are illegally discriminatory: intentional discrimination under the Equal Protection Clause, preservation of the effects of past discrimination under the Equal Protection Clause and disparate impact under Title VI of the Civil Rights Act of the Civil Rights Act of 1964.[23]
        - Intentional discrimination is arguably the most difficult of these to establish as plaintiffs must show that a school district forseeably implemented a policy at least in part because of the adverse effects it would have on a protected group – a difficult standard to prove. The past discrimination claim was the issue addressed by in *Debra P.*, specifically, at what point test score differences were due to past discrimination.[24] The court finally found that to the extent that differences could have been attributable to past discrimination (students taking the test themselves

attended a non-unitary school), the tests were not permissible.[25] However, once all students taking the test attended unitary schools, the test policy was allowed.[26]

    - The claim of disparate impact under Title VI, on the other hand, is a very viable charge against high stakes testing programs. Title VI of the Civil Rights Act of 1964, the enforcement legislation to the Fourteenth Amendment, prohibits programs receiving federal funds from discrimination on the basis of race or national origin. Under this federal civil rights statute, students and parents (as part of public schools receiving federal funding) may file complaints with the U.S. Department of Education's Office for Civil Rights (OCR), which has a procedure for reviewing such complaints, determining whether illegal activity has occurred, and imposing sanctions (i.e., loss of federal funds).[27]
    - Lower courts in many jurisdictions have recognized a three-part test to establish claims under Title VI. First, the plaintiffs must show by a preponderance of the evidence that the policy resulted in a disproportionate adverse impact to a protected group. If this is established, the burden shifts to the defendants to justify its policy's "educational necessity." Some courts have interpreted "educational necessity" to mean that defendants must show the policy has a "substantial legitimate justification." Other courts have required that the defendant show that there exists a "manifest relationship" between the test and the defendant's educational objectives.[28]

  - o Due Process
    - Substantive Due Process - it must be found that the mission or goals of a testing policy are "reasonable" and serve a "legitimate state interest."[29]
    - Procedural Due Process - students must be given the opportunity to learn tested skills upon which denials of education are based, and notice of a district's testing policy.[30]

CPS Promotion Policy – 00-0823-PO4

- The purpose of the policy is to provide standards for promoting elementary school students The promotion guidelines demonstrate key objectives of the Chicago Board of Education:
  - ✓ The promotion of high educational standards for students
  - ✓ Consistency in educational opportunities provided to all students
  - ✓ Implementation of a plan of system-wide monitoring to verify the quality of instruction and type of instructional materials provided to students are calculated to achieve student master of the skills and knowledge which are assessed in making promotion decisions

- ✓ Ensuring that the district's educational objectives are met in a fair and non-discriminatory manner

- Effective with the start of the 2000-2001 school year
- Students in the 3rd, 6th and 8th grades ("the benchmark grades")
- Promotion is based on possession of the knowledge and skills appropriate to student's grade level as demonstrated by their performance on multiple measurements including the ITBS, and as appropriate, the assessment of other factors (described below).

Students at the benchmark grades who have a score:

- ➢ **at or above** designated ITBS scores and have passing grades in reading and mathematics shall be automatically promoted to the next grade.
- ➢ **below** the ITBS cut-off scores, shall have additional criteria reviewed automatically by the Office of Schools and Regions to determine promotion to the next grade. Students who meet all seven of the criteria or who have one or more significant deficiencies on the additional assessments are promoted to the next grade with satisfactory completion of mandatory summer school. These criteria that are considered include:
    1) classroom grades of B or better in reading and mathematics for the academic year
    2) passing reading and mathematics unit test scores
    3) evaluation of student's score on the Illinois Student Assessment Test (ISAT) or any state-sanctioned assessment that demonstrates the students' competencies in math and reading at the appropriate grade level
    4) evaluation of the student's prior year score on the ITBS (i.e., attainment of a score in the previous year within the range indicated that the student mastered grade level material in reading and mathematics)
    5) student's attendance during the academic year at a rate of 90% or better
    6) student's consistent completion of homework assignments during the academic year
    7) student's conduct during the academic year (i.e., the absence of any significant discipline infractions)
- ➢ **below** the ITBS cut-off scores or have a failing final report card grade in reading or mathematics or have more than 20 days unexcused absences will not be promoted to the next grade unless they: (1) satisfactorily complete of summer school (2) maintain attendance at a rate of 90% or better (3) pass a re-test of the ITBS in August. Students whose scores fall below the minimum range scores shall be retained at grade level[31].

- Monitoring of Instruction - To ensure consistency throughout the school system and that there is a strong alignment between the test and other assessment criteria, the curriculum, and classroom instruction, CPS has undertaken the following steps:
  - ✓ The Office of Schools and Regions and the Office of Accountability will implement a system for monitoring classroom instruction that includes random unannounced visits
  - ✓ All elementary schools where aggregate student reading scores on the ITBS indicate that less than 50% of the school's students tested at or above the national norms, may be required to use a standardized reading curriculum provided by the Department of C&I.
  - ✓ A district-wide Textbook Committee will develop a list of recommended texts, and the committee may mandate the use of specific textbooks to ensure the greatest possible correlation to grade level instruction and shall develop procedures for effectively monitoring the purchase of instructional materials at the individual school level.

- Additional Support for Students Determined to be Academically at Risk – For students who have a deficit in classroom grades and/or who have excessive unexcused absences, one or more of the following additional types of support may be provided:
  1) Mandatory attendance in an extended day ("Lighthouse") program
  2) Required participation in after-school tutoring in a small group or on an individualized basis
  3) Participation in daily pullout class for remedial instruction in reading and/or mathematics
  4) Provision of after-school assistance with homework assignments
- The District may implement the use of a "contract' developed for the student with the participation of the teacher(s) and parent or guardian of the student. The contract will establish general progress objectives for the student each semester which will be reviewed weekly by the teacher and provided to the parent or guardian with a requirement for a sign-off by the parent. Quarterly parent/student/teacher conferences will be held to discuss student progress.
- This individualized academic support may be available to students who consistently test two years or more below the grade level on the ITBS.

- Parental Notification – principals are required to notify parents in writing of the promotion policy beginning with the first week of the school year and prior to October 1st of each school year. The policy will clearly articulate the right of a parent/guardian to seek review of the District's determination not to promote a student.

- At the end of the 5th, 15th, 50th, 20th, 25th, 35th and 30th week, parents shall be notified in writing if their child is in danger of receiving a failing grade in reading or mathematics.
- Student assistance shall be provided at the earliest point a child is identified as being at risk for obtaining a failing grade.
- If a student receives a failing grade at the end of the 20th week, notification must be sent to the student's parent/guardian by certified mail.
- If the parent or guardian does not attend a Report Card pick up conference at the 30th week, notification must be sent to the student's parent/guardian by certified mail.
- Within 10 days of the receipt of the ITBS scores, parents must be notified regarding whether their child will be promoted and whether summer school attendance is required.
- Notice will include a copy of the Review procedures (below). Finally, if a student has accumulated 10 days of unexcused absences (including absences created by an out of school suspension), schools shall be required to notify the parents or guardian by certified mail that the student may be required to attend summer school. Notification is also made at 15 and 20 days of unexcused absences.

- Request for Review of Promotion Determination – within 10 calendar days from the date the promotion decision is communicated to the parents/guardian, a parent/guardian or the principal of the school which the students attends has the right to request review of the determination that the student not be promoted in June an is required to attend summer school. The request must be in writing to the Office of Schools and Regions, which will undertake a review of the student's performance, based on the established criteria and any other evidence of acceptable reading and math skills and knowledge and shall notify the parent/guardian within 5 days of the decision to grant exemption from this policy.

- Assessment Validation and Maintenance of Data – The District will on a periodic basis review the use of the ITBS, in part, as a factor in determining student mastery of reading and mathematics skills. The District will maintain all testing data by race and national origin of test takers and shall annually review this data with regard to students who are promoted and retained pursuant to the requirements of the policy in order to ensure that there is no disparate impact based on race or national origin created by the operation of the policy. Such data shall be made available to any parent upon request.

105 ILCS 5/10-20.9a Final Grade; Promotion

(a) Teachers shall administer the approved marking system or other approved means of evaluating pupil progress. The teacher shall maintain the responsibility and right to determine grades and other evaluations of students within the grading policies of the district based upon his or her professional judgment of available criteria pertinent to any given subject area or activity for which he or she is responsible. District policy shall provide the procedure and reasons by and for which a grade may be changed; provided that no grade or evaluation shall be changed without notification to the teacher concerning the nature and reasons for such change. If such a change is made, the person making the change shall assume such responsibility for determining the grade or evaluation, and shall initial such changes.

(b) School districts shall not promote students to the next higher grade level based upon age or other social reasons not related to the academic performance of students. On or before September 1, 1998, school boards shall adopt and enforce a policy on promotion as they deem necessary to ensure that students meet local goals and objectives and can perform at the expected grade level prior to promotion. Decisions to promote or retain students in any classes shall be based on successful completion of the curriculum, attendance, performance based on Illinois Goals an assessment Program tests, the Iowa Test of Basic Skills, or other testing or any other criteria established by the school board. Students determined by the local district to not qualify for promotion to the next higher grade shall be given remedial assistance, which may include but not be limited to, a summer bridge program...modifications to instructional materials, and retention in grade.

Legal Analysis of the CPS Promotion Policy

A. Title VI

1. Disparate Adverse Impact

- A possible challenge to the CPS promotion policy might be raised under Title VI based on the disparate adverse impact in ITBS scores by race.
- In Chicago, there were disparities in the 2000 results from the ITBS tests. African American students were almost three and a half times more likely than white students to score in the bottom national quartile on the reading comprehension section of the ITBS. Similar differences also occurred in the math scores on the ITBS.[32] (Data from the 2000 administration of the ITBS are the most recent data publicly available broken down by race.)

2. Nexus between testing and score disparities

- To establish disparate impact under Title VI a party would have to show a "nexus" between the score disparities and students' race or national origin.

- In *G.I. Forum* the Texas court did not find a link between the high-stakes test result and the students' race. Instead, the Texas Education Agency argued successfully that the accountability system was established with knowledge of the probable disparities, and the system was an attempt to establish standards and policies uniform from school to school.[33]
- Chicago Public School's purpose of the promotion policy is a way of "insuring that there is consistency in the educational opportunities provided to all students". Thus, based on this assertion it is probable the policy would be similarly viewed as Texas's program. CPS could argue it is trying correct a disparity and thus it would prevail on this argument as long as its actions are consistent with the statements made.
- The court in *G.I. Forum* , however, found that although there was a disparate impact of the high-stakes testing on minority students it was smaller difference than seen nationally.[34] This does not appear to be the case for Chicago. In Chicago there is a quite large percentage of minority students scoring in the lowest national quartile on the ITBS as compared minorities nationally. Thus this portion of *G.I. Forum* may not be applicable to Chicago.

3. **Educational Necessity**

- If disparate impact and a nexus between the ITBS and score disparities is found, the burden shifts to the school district to show the policy's educational necessity.[35]
- In *GI Forum*, for example, the court found disparate impact of the test but ruled that the graduation requirement was "educationally necessary."[36]
- Coleman and Peabody,[37] assert if the test "doesn't make educational sense, it can't make legal sense under federal civil rights laws." Thus if there is no educational justification the use of the test will be invalid.
- Heubert and Hauser,[38] also assert that a court will be more likely to strike a high-stakes test when "the consequence of a test is a low-quality program or placement rather than one that is 'educationally necessary'..."
- A wealth of social scientific research has indicated a myriad of negative sequelae related to retention, including higher dropout.[39] While the argument could be made that retention is not "educationally necessary" courts typically defer to school officials in making such determinations. The district could claim that their testing program, balanced by an alternative method by which students can be promoted, is actually designed to address the disparities and eventually close them, thus realizing their intent.

B. **Due Process**

1. **Substantive due process** analysis consists of an examination of the legitimacy of the mission of the governmental program as to whether or not the program serves a "legitimate state interest" and is "reasonable".

   - Chicago Board of Education policy 00-0823-PO3 states the following purpose the central objectives of the policy as:
     (a) The promotion of high educational standards for its students;
     (b) Ensuring that there is consistency in the education opportunities provided to all students;
     (c) Implementation of a plan of system-wide monitoring to verify that the quality of instruction and type of instructional materials provided to students are calculated to achieve student mastery of the skills and knowledge which are assessed in making promotion decisions; and
     (d) Ensuring that the district's educational objectives are met in a fair and non-discriminatory manner.
   - Based on these articulated reasons for the policy it is likely that a court would find a "manifest relationship" between the test and the educational mission of the policy, thus sustaining the reasonableness of the policy on due process grounds.

2. **Procedural due process** analysis consists of an examination of whether there is sufficient advance notice of the promotion requirement and the nature of the test so that students have a fair opportunity to pass it. Procedural due process also involves whether the policy provides students and parents with an opportunity to be heard on matters relating to the policy.[40]

   - The CPS policy requires parental notification of the promotion policy by the "beginning with the first week of the school year and prior to October 1st of each school year" from the school principal in writing. *Debra P. v. Turlington* held four years notice was sufficient, while other courts have found that two years was *not*.[41] Thus, CPS notification of six months may be insufficient.
   - The CPS policy provides some procedures by which students and parents are given an administrative review of a retention decision. The CPS policy states in Section 7 that:

     > *…within 10 calendar days from the date the promotion decision is communicated to the parents/guardian, a parent/guardian or the principal of the school which the student attends has the right to request review of the determination that the student not be promoted…The review procedures will be provided to the parents/guardians in writing…All such requests for review shall be in writing and shall contain the following information: the cumulative grade card, attendance record, conduct*

> *information, and whether the student has a disability…The request forwarded shall be directed to the Office of Schools and Regions…*

This administrative review should be adequate process to meet procedural due process requirements. There is further process provided when the student is given with remediation to avoid retention.

- Courts have required a showing that the test measures material which the school has actually taught students. In *Anderson v. Banks*,[42] a federal district court required a school district to illustrate that the questions of the California Achievement Test (CAT) had actually been covered in the curriculum before allowing the test to be used as an exit exam. While in *Debra P*, the court accepted a study conducted on behalf of the defendants as to the validity of the graduation test.[43] Under the CPS policy there is to be a curricular and instructional match. The policy provides:

  > *[To] ensure that student achievement is maximized, that the utilization of the designed educational criteria is done in a manner that ensures consistency throughout the school system, and that there is a strong alignment between the tests and other assessment criteria, the curriculum, and classroom instruction.*

  If this policy is consistently followed and there is a curricular and test match the likelihood of a successful challenge is minimal. Although required by precedent and CPS policy, it is possible that even though the official curriculum specifies the skills and knowledge to be taught and teachers recognize as something they *should* teach, in practice they may fail to adequately do so.

- Courts have sympathized with the possibility that some students will be unfairly tested in individual classrooms in which there is little or no instructional match. However, the court in *Debra P* found that such cases are exceptions rather than the rule, and the occurrence might not rise to the level of a constitutional infringement.[44] CPS has tried to minimize the variance. Under Section 4 the district may perform random, unannounced classroom visits; implement a standard reading curriculum; committee mandated use of mathematics and reading textbooks; and committee monitoring of instructional materials. It could be argued that these steps are not sufficient or practically effective. Again, though, courts tend to yield to districts' stated efforts, while remaining hesitant to make what they see as professional judgments. This tendency was seen in *G.I. Forum v. Texas Education Agency*, in which the due process claim was dismissed as it was found that the state standards mandated that the test match the stated goals of the curricula.[45] Coupled with a finding that the testing program was in line with these standards, the due process claim failed.

C. Other Concerns

- The possibility that CPS uses the ITBS beyond what the ITBS publishers recommend as appropriate use of the test may be legally problematic. In *U.S. v. Fordice*[46], the Supreme Court struck down the exclusive use of ACT composite scores in making college admissions decisions because the ACT user's manual recommended that such decisions be based on ACT subset scores, self-reported high school grades, and other factors. CPS principally uses the ITBS in making promotion decisions and, while other factors are considered, failure to achieve a cut-off score on the ITBS is the ultimate determinant of whether a student will be promoted. The test failure is the "ultimate" determinant of whether a student is promoted. It is only the ultimate determinant of whether additional data is necessary to make the decision. If a child fails, s/he may still be promoted through the alternative mechanism. Whether it's fair to make all kids who fail the ITBS attend summer school if all other indicators suggest the child is achieving, is another matter. Publishers of the ITBS warn against the test being used as a sole criterion in educational decision making.
- Despite legal concerns of the CPS promotion policy, courts are typically reluctant to get involved in educational decision making of schools thus the ability to challenge a retention decision is limited. Most courts are deferential to policy decisions made by the schools.
- A final issue related to high-stakes testing is the practice of "teaching to the test". While due process requires that students are given the opportunity to learn the material that is being tested, the flip side of this is that, in some cases, there may be a concern that instruction is *too* matched to the test, such that the testing policy too rigidly dictates classroom practices. This is purely an educational concern – not a legal one – but it nonetheless raises issues to be considered in the current climate of high stakes testing and accountability policies. In 1998, a teacher within the Chicago Public School System wrote:

  > *…I am alarmed at the increasing number of people, including teachers, who are beginning to view the ITBS as the goal of our educational program and not just an assessment tool…I was surprised when teachers at one West Side school indicated they had to put away their reading books after December until testing was over in the spring so they could concentrate on practice tests. Several teachers on the South Side have told me that their schools were purchasing test-taking materials and so couldn't spend as much on books for classroom libraries…One principal confessed that he knew what good instruction looked*

> *like, but he couldn't spend staff development money on it until his scores went up. Unfortunately, when I talk with teachers and principals from across the city, it's evident that at many schools the ITBS tests and test-taking skills are becoming the curriculum, and good instruction is suffering.*[47]

Clearly there should be concern about different schools' approaches to preparing students for the ITBS. Thus, legal attention should follow the implementation and execution of accountability programs to insure that due process, Title VI, and other educational deprivations do not occur.

Note: Final version of this article will be printed in the Fall 2002 Issue, Volume 22, Number 3, of the Children's Legal Rights Journal. The CLRJ is edited by students at the Loyola University of Chicago School of Law and the ABA Center on Children & the Law, and is published by William S. Hein & Co., Inc. Subscription information is available by calling the publisher at (800) 828-7571.

---

[1] PL 107-110
[2] Key State Education Policies in K-12 Education (p. 16) found at http://publications.ccsso.org/ccsso/publication_detail.cfm?PID=195
[3] Debra P. v. Turlington, 474 F. Supp. 244 (M.D. Fla. 1979), *aff'd in part* and *rev'd in part*, 644 F. 2d 397 (5th Cir. 1981), remand, 564 F. Supp. 177 (M.D. Fla. 1983), *aff'd*, 730 F.2d 1405 (11th Cir. 1984);
[4] Id.
[5] 564 F.Supp. 177, 179-180.
[6] 474 F.Supp. 244, 267.
[7] Id. at 268-9.
[8] 564 F.Supp. at 186. See also, 474 F. Supp. at 262, 248-9.
[9] 474 F.Supp. at 269.
[10] 564 F. Supp. at 180.
[11] Id. at 186.
[12] Id.
[13] Id.
[14] Id. at 188-189.
[15] G.I. Forum v. Texas Education Agency, 87 F. Supp.2d 667 (W.D. Tex 2000).
[16] Id. at 668
[17] Id.
[18] Id.
[19] Id at 670.
[20] Id.
[21] Id at 677.
[22] Id. at 671
[23] U.S. Constitution, Amendments V and XIV, Civil Rights Act, 42 U.S.C. § 2000d (2001).
[24] 564 F.Supp. 177, 186-9
[25] Id.
[26] Id.
[27] Civil Rights Act, 42 U.S.C. § 2000d (2001).
[28] See HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION 59 (Jay P. Heubert & Robert M. Hauser eds., National Academy Press 1999) and cases cited therein.
[29] 87 F.SUPP.2D 667, 682-683.

---

[30] 564 F.Supp. at 177.

[31] The policy also contains a provision relating to students with disabilities but they are not considered for purposes of this paper.

[32] Data available at http://www.cps.k12.il.us

[33] 87 F. Supp.2d at 670.

[34] Id. at 677.

[35] The Courts, Validity, and Minimum Competency Testing. (George F. Madaus, ed., Boston: Kluwer Nijhoff Publishing 1983).

[36] 87 F. Supp.2d at 670-671.

[37] A.L. Coleman, *Framework for Addressing Student Test Issues*. Paper presented at the Annual Education Law Association Conference, Atlanta, Georgia (November, 2000).

[38] HIGH STAKES: TESTING FOR TRACKING, PROMOTION, AND GRADUATION 57-62 (Jay P. Heubert & Robert M. Hauser eds., National Academy Press 1999).

[39] FLUNKING GRADES: RESEARCH AND POLICIES ON RETENTION, 64-79 (Lorrie A. Shepard and Mary L. Smith, eds. The Falmer Press 1989).
Stuart Luppescu, Anthony S. Bryk, Paul Deabster, John Q. Easton, and Yeow M. Thum, *School Reform, Retention Policy, and Student Achievement Gains* Chicago: Consortium on Chicago School Research (1995) found at http://www.consortium-chicago.org.

[40] The Courts, Validity, and Minimum Competency Testing. (George F. Madaus, ed., Boston: Kluwer Nijhoff Publishing 1983).

[41] 474 F.Supp. 244, 267.

[42] Anderson v. Banks, 540 F. Supp. 761, 765 (S.D. Ga. 1982).

[43] 564 F. Supp. at 177-178.

[44] Id.

[45] 87 F. Supp.2d 667, 670.

[46] United States v. Fordice, 426 U.S. 717, 737-38 (1992).

[47] Barbara Kato, *Testing Focus Distorts Teaching* (1998) found at htttp://www.catalyst-chicago.org/09-98-098wkato.htm.

Education Law Association 48th Annual Conference.
Topic Session G-6

Narrative Outline
Integrating Legal Rights of Students into the School Curriculum

James O. Tate, J.D., Ph.D.
Southwestern Oklahoma State University,
School Service Programs
100 Campus Drive
Weatherford, Oklahoma 73096

Introduction

Educational practitioners, theorists, and researchers have used the term *curriculum* in various ways. While no definition has become universally accepted, there are similar definitions currently in use ranging from "a course of study" to "all the experiences that students have while at school," and, "The experiences, both planned and unplanned, that enhance (and sometimes impede) the education and growth of students."[1]

However, an even more comprehensive definition of curriculum is required in terms of the needs and trends that characterize our lives in the twenty-first century. That definition of curriculum is " . . . all of the experiences that individual learners have in a program of education whose purpose is to achieve broad goals and related specific objectives, which is planned in terms of a frameworks of theory and research or past and present professional practice."[2] The phrase *program of education* means that the curriculum is a planned program developed by teachers and other professionals. The planned objectives of a curriculum are developed in light of theories and research on social forces, human development, learning, and knowledge, and cognition.[3]

This article addresses social forces that impact the school curriculum regarding legal rights of public school students. It identifies areas of concern and recommends methods for ensuring that the legal rights of students are integrated into the school's curriculum.

Levels of Social Forces in the Curriculum

Three levels of social forces influence the curriculum: the national and international level, the local community level, and the culture of the school setting in which the curriculum is implemented. Each school has a distinctive culture – a set of guiding beliefs, assumptions, values, and traditions that distinguish it from other educational settings. Some schools may be characterized as communal places where there is a shared sense of purpose and a commitment to providing students with meaningful, carefully thought out curricular experiences. Others lack a unified sense of purpose or direction while others may be characterized by internal discord, conflict, and divisiveness.[4] The culture of the school setting is where the legal rights of students are inculcated into the curriculum.

Compared to most Western democracies, America is returning to an 18th-century model of punishment and retribution in dealing with misbehavior and delinquency. However, studies that have compared punishment with prevention in juvenile detention centers demonstrate that education, rehabilitation, and therapy are much more successful than punishment in decreasing the re-arrest rates. But many Americans reject reliable scientific data because they are subject to a pattern of thought referred to as the Singapore Syndrome.[5]

---

[1] Parkay, F.W., and Stanford, B. *Becoming a Teacher* (4th ed.). Boston: Allyn and Bacon, 1998. p. 347.

[2] Parkay, F.W. and Hass, G. *Curriculum Planning: A Contemporary Approach* (7th ed.). Boston: Allyn and Bacon, 2000. pp. 2, 3.

[3] *Id.* at 3.

[4] *Id.* at 53.

The Singapore Syndrome is a set of antidemocratic beliefs that emerged as a result of reactions in 1994 to the proposed public flogging of 18-year-old Michael Fay, an American student living in Singapore. In an 8 April 1991 *Newsweek* poll, thirty-eight percent of Americans approved of Fay's canning. Conservative politicians throughout America tried to reintroduce flogging into our penal codes soon after the Fay story broke. Florida representative, Berly Burke was quoted as saying, "Bruises, welts, and broken bones do not constitute child abuse." Supreme Court Justice Antonin Scalia reinforced Burke's thinking by claiming that caning is probably constitutional and an improvement over the more horrible things that were done in 1791 when cruel and unusual punishment were defined.[6]

Schools are increasingly driven by polices and politics of punishment. Many persons believe that safe and orderly schools require automatic punishments based on zero tolerance policies. The automatic use of punishment, as opposed to prevention of misbehavior and violence in schools, makes the schoolhouse toxic for too many students. Society should be concerned about educators who are inherently punitive and autocratic. Instead, society's belief in exaggerated and distorted accounts of school violence result in punitive policies that victimize students. Nationwide, statistics gathered by the Justice Policy Institute and the U.S. Department of Education show that crime of all sorts is down at public schools since 1990 – some studies say by as much as 30 percent. Less than 1 percent of all violent incidents involving adolescents occur on school grounds.[7]

The line between school supervision and police action becomes blurred with warrantless, school-wide urine screening and massive drug searches. The routine and unquestioning acceptance of these policies is undermining and distorting students' understanding and belief in constitutional. There is also the simple fact that such policies do not work.[8]

Society and the School Curriculum

The close relationship between the social environment and the development of an appropriate curriculum is evident if three developmental tasks that citizens in a democratic society must accomplish are considered. First, in our society, each person's identity is determined largely by his or her occupation. The work environment is the setting for most individual's day-to-day experience. Second, a democratic society requires citizens who are prepared to deal with the current issues of government. Finally, each person faces the challenge of achieving self-fulfillment and self-development. Therefore, from the individual student's standpoint, an appropriately developed curriculum must enhance the student's ability to accomplish developmental tasks in three areas: vocation, citizenship, and self-fulfillment.[9] The deprivation of students' legal rights in the school curriculum greatly compromises their development in those three areas.

---

[5] Hyman, I.A., and Snook, Pamela A. "Dangerous Schools and What You Can Do About Them." *Phi Delta Kappan* 81, no. 7 (March 2000): 489-501.

[6] *Id.*

[7] Tebo, Margaret Graham. "Zero Tolerance, Zero Sense." *The American Bar Association Journal* (April 2000): 41-113.

[8] Hyman, I.A., and Snook, Pamela A. "Dangerous Schools and What You Can Do About Them." *Phi Delta Kappan* 81, no. 7 (March 2000): 491.

The culture of the educational setting within which the curriculum is implemented is the social forces that determine the quality of life at the school. Those social forces include the individual learner's social status, the teacher's role in the school, the teacher's role in relation to other professional staff, and the degree of harmony or discord that characterizes school-community relationships.[10] The fact that a student's well-being is connected to the student's ability to learn is reflected in the Interstate New Teacher Assessment and Support Consortium (INTASC) "Principles for Beginning Teachers." Principle Ten states, "[The] Teacher fosters relationships with school colleagues, parents, and agencies in the larger community to support students' learning and well-being."[11] The following areas of concern and recommendations for improvement are curriculum concerns in that they are part of " . . . all of the experiences that individual learners have in a program of education."[12]

Due Process

Due process is a guarantee that a student's constitutional rights will not be abridged without notice of an alleged violation of rules or law, which has as a consequence the loss of important rights, coupled with the opportunity to tell one's own side of the story. Simply put, due process is notice of school policies and consequences, and the opportunity to be heard by the student. All states have compulsory school attendance laws. Therefore, due process is required for any action by a school district that causes a student to miss any school.[13]

A due process hearing is similar to a court hearing, except the rules of evidence are relaxed. Therefore, hearsay evidence (out-of-court statements offered for their truth) may be presented, and everyone in attendance may offer facts and opinions. Everyone is entitled to a due process hearing when important rights are involved. A student does not have to be a citizen for the due process provisions of the Constitution to be set in motion.[14]

---

[9] Parkay, F.W. and Hass, G. *Curriculum Planning: A Contemporary Approach* (7th ed.). Boston: Allyn and Bacon, 2000. p. 51.

[10] *Id.* at 53.

[11] Seyfarth, John T., *Human Resources Management for Effective Schools* (3rd ed.). Boston: Allyn and Bacon, 2002. p. 35.

[12] Parkay, F.W. and Hass, G. *Curriculum Planning: A Contemporary Approach* (7th ed.). Boston: Allyn and Bacon, 2000. p. 3.

[13] Prickett, Charles, "Due Process and Impartiality." *Principal Leadership* (December 2001): 47-49.

[14] *Id.* at 49.

Impartial Hearing Officer

School districts that use administrative personnel as hearing officers are engaging in a risky practice that could furnish legal grounds to attack a decision to suspend or expel a student. The fundamental fairness of the hearing may be challenged if conducted by a hearing officer who does not appear to be impartial and who may not have the training and experience to conduct a formal hearing. Public school administrators are not inherently unfair or unable to determine the facts and apply school rules. However, they are in daily contact with administrators, teachers, and staff members who present their observations and conclusions at the due process hearing, and it is their testimony on which the hearing officer bases a decision. Internal administrators have to work with those workers every day, and there are good reasons to question whether their decisions are influenced by their contacts with witnesses who are also coworkers. There is no mandatory rule concerning the use of outside hearing officers. However, the better practice is to have a person hearing the evidence who is not subject to influence by personal relationships with those giving testimony.[15]

Appeal Procedures

If the hearing officer is an administrator in the school district, a student should have the right to appeal the hearing officer's suspension decision before the student is removed from school. The student could appeal the decision to another administrator who is not involved in the matter (presenting testimony, conclusions, etc.). In the alternative, the student could appeal the hearing officer's decision to a committee of teachers and administrators. The appeal committee should be trained in the appeal procedures and have clear guidelines concerning the committee's authority as to issues that may be appealed and the final dispensation of the matter. Ultimately, the student should be provided an opportunity to appeal a long-term suspension or expulsion (over ten days) to the board of education.

No Tolerance Policies

There are no current statistics available on the number of public school students who are formally disciplined or prosecuted for wrongdoing. However, in a seminar sponsored by the American Bar Association Juvenile Justice Center, an informal discussion showed a sharp increase in the number of clients seeking counsel over perceived injustices in school discipline. Students whose misbehaviors in the past would have called for oral reprimands are now being labeled a threat to school safety. Those same students involved in "kids-will-be-kids" incidents are now facing punishments ranging from suspension to expulsion to referral to the juvenile court system for behaviors that even the schools agree do not actually compromise safety. The result is a growing alienation between the administrators who implement the zero-tolerance policies and the students they are trying to protect.[16]

---

[15] *Id.*

Even students who have rarely been in trouble before their run-in with zero-tolerance seem to be getting a message from the school that mistakes of youth will not be tolerated and second chances are rare. As Bernadine Dohrn, director of the Children and Family Justice Center at Northwester University School of Law stated, "The message that kids are getting is, 'Our main enemy is among us and it is our children.'"[17]

Zero-tolerance policies are the epitome of the authoritarian organizational model. An authoritarian structure emphasizes bureaucratic authority at the expense of professional consideration. Authority is based on position and hierarchy. Disciplined compliance to the rules, regulations, and directives is the basic principle of operation. Rules and procedures are impersonally applied. The superior always has the last say. Authoritarian structure has been described as a punishment-centered bureaucracy.[18]

Equal Treatment vs. Equitable Treatment

Students are expected to learn to make differentiations of degree on various types of matters in their schoolwork. Students are able to understand that there is a difference between being treated equally and being treated fairly. Middle school and high school students care most about fairness. When they see two students whose "offenses" are vastly different being treated exactly the same, that sense of fairness is obliterated and replaced with fear and alienation. The goal of the school curriculum should be to keep students in school, not look for more ways to get rid of them. However, helping students to learn from mistakes often takes a back seat to law-and-order concerns.[19]

Schools tend to hold to the misguided concept that treating everyone the same will protect the school from lawsuits. Generally, courts find that a decision on expulsion is a matter for the school board's discretion. The only requirement appears to be minimal due process, which the courts have found can be satisfied by merely holding a hearing at which the student and parents are given an opportunity to speak. Courts have been extremely reluctant to invade the territory of school authorities to make disciplinary decisions.[20]

---

[16] Tebo, Margaret Graham. "Zero Tolerance, Zero Sense." *The American Bar Association Journal* (April 2000): 41.

[17] *Id.*

[18] Hoy, Wayne K., and Miskel, Cecil G. Educational Administration: Theory, Research, and Practice (5th ed.). New York: McGraw-Hill, Inc., 1996. pp. 60-61.

[19] Tebo, Margaret Graham. "Zero Tolerance, Zero Sense." *The American Bar Association Journal* (April 2000): 41.

[20] *Id.* at 42.

Recommendations

Democratic Schools

In the area of discipline and student rights, punitive and authoritarian impulses in a community can rule policy making and impose severe sanctions on individuals who do not conform to community standards. As a result, students' rights can be easily trampled.

A school curriculum that encourages participatory democracy is characterized by a climate in which students and staff members understand the need to respect on another's rights. Democratic schools establish a curriculum that provides students with a sense of shared responsibility with the school staff for assuring the safety for all. The curriculum encourages students to participate in democracy when they become adults in society. The tendency of adults toward apathy about government authorities can be averted if students have the real-life experiences of influencing school policies that adversely affect their lives.

One of the best indicators that a school is oriented toward democratic principles is the morale of the school staff. Morale will be high if the school board and administrators seek consensus by responding to the needs of teachers, students, and parents. Policymaking is characterized by committee efforts to define problems and consensus building to shape solutions.[21]

Democratic Classroom

In an authoritarian classroom, where discipline is based on external controls, removal of the teacher leads to a loss of control of the students. The model for control is punishment by an external factor – the teacher. When students become more confident of the teacher's absence, they become more unruly. Bullying, fighting, and threats to get the teacher and the principal tend to occur. By contrast, in democratic classrooms, students internalize the values of their classrooms. Cooperation among students in democratic classrooms is much higher resulting in better seatwork and work in groups.[22]

Understanding Civil Liberties

The school curriculum is the one place where liberty can be successfully instilled in the hearts and minds of all students. Therefore, students must be taught the importance of protecting and ensuring the constitutional rights of every American in order to keep their own rights out of danger. The best method for teaching civil liberties is modeling by the teacher in his or her relationships with students and professional peers.

---

[21] Hyman, I.A., and Snook, Pamela A. "Dangerous Schools and What You Can Do About Them." *Phi Delta Kappan* 81, no. 7 (March 2000): 492.
[22] *Id.* at 496.

If students are not taught, within developmental limits, how to freely express their ideas, how will they ever truly learn to understand the nature and concept of free speech? At all grade levels, students should be taught to express their feelings and ideas in appropriate ways. They should be encouraged to question what teachers say. They should challenge information they are given – both alleged facts that do not seem correct and interpretations of events with which they do not agree.

Peer Mediation

Peer mediation is a program that teaches strategies to students that allow them to handle conflicts in a positive and constructive manner. With proper training and application of that training, students learn to use conflict as a positive force that can lessen the detrimental effects of conflict and increase social skills and personal image of self. By including peer mediation in the school curriculum, the benefits are shared by all. There are benefits for student conflict mediators, the student body-at-large, families, and society. The skills learned and benefits gained from peer mediation will follow students the rest of their lives.[23]

Compassionate Leadership

Education is not a business. Excellence in education does not necessarily mean being tough. Holding high standards, but at the same time providing compassionate support to help students and staff are the hallmarks of effective leadership. Being an educational leader is not about climbing ladders – it is about service. Service entails listening to others, caring for them, and quietly going about doing one's job.

We tend to see confrontations in terms of right and wrong, winners and losers. Students can become easily convinced of the battle lines teachers inevitably create with conflict and punishment. However, there is another option.

Punishing students is easy because teachers and administrators have clearly superior skills in discipline. However, the true purpose of classroom supervision is to change student behavior rather than the arbitrary enforcement of discipline. In his book, *The Art of War*, Sun Tzu wrote more than 2,000 years ago, "100 victories in 100 battles is not the most skillful. Subduing the other's military without battle is most skillful."[24]

Education should be about helping students become more humane, caring individuals, capable of dealing with the complex issues that the world presents. In holding that curriculum is ". . . all of the experiences that individual learners have in a program of education," we can model humane behavior for our students without sacrificing standards of learning or behavior.

---

[23] Reggio, Michael H. "Peaceful Resolution for Oklahoma Students." The Oklahoma Bar Association (1994): p. 6.

[24] Heller, Daniel A. "The Power of Gentleness." *Educational Leadership*, Vol. 59, No. 8 (May 2002): pp. 76, 77.

References

Heller, Daniel A. "The Power of Gentleness." *Educational Leadership*, Vol. 59, No. 8 (May 2002).

Hoy, Wayne K., and Miskel, Cecil G. Educational Administration: Theory, Research, and Practice (5th ed.). New York: McGraw-Hill, Inc., 1996.

Hyman, I.A., and Snook, Pamela A. "Dangerous Schools and What You Can Do About Them." *Phi Delta Kappan* 81, no. 7 (March 2000).

Parkay, F.W. and Hass, G. *Curriculum Planning: A Contemporary Approach* (7th ed.). Boston: Allyn and Bacon, 2000.

Parkay, F.W., and Stanford, B. *Becoming a Teacher* (4th ed.). Boston: Allyn and Bacon, 1998.

Prickett, Charles, "Due Process and Impartiality." *Principal Leadership* (December 2001).

Reggio, Michael H. "Peaceful Resolution for Oklahoma Students." The Oklahoma Bar Association (1994).

Seyfarth, John T., *Human Resources Management for Effective Schools* (3rd ed.). Boston: Allyn and Bacon, 2002.

Tebo, Margaret Graham. "Zero Tolerance, Zero Sense." *The American Bar Association Journal* (April 2000).

The Legal Status of the Course Syllabus

Terrence Leas, Ph.D.
Yakima Valley Community College

Education Law Association 48th Annual Conference
November 16, 2002

Introduction and Background

As American society becomes more litigious, we can understand why students increasingly turn to the courts for help. They want justice or what they perceive to be justice when they feel they have suffered unjustly at the hands of a professor. The professor-learner relationship is uneven, with the professor as the dominant party. Thus, many issues influenced by differing expectations and behaviors arising out of that relationship create conflict.

This session examines the current status of the higher education course syllabus and e-syllabus relative to the law and best practices of teaching and learning. The primary focus of this session is on the legal status of the syllabus and will review the current legal status of the course syllabus in American higher education and offer recommendations for managing the inevitable conflict that arises in the professor-learner relationship. The session will use a PowerPoint, lecture, and question-and-answer format to review the case law related to the course syllabus and the elements of a generic course syllabus that incorporates the best practices in effective teaching and learning. Participants will receive a checklist of "best practice" elements to include in a syllabus to help professors manage the inevitable conflicts that emerge in the classroom. The presentation will employ the following outline:

1. **Elements of a contract**
2. **Course syllabus vs. contract**
3. **Analysis of relevant case law**
4. **Elements of a course syllabus**
5. **Sample course syllabus checklist**

Index of Authors

Aleman, Steven R. 235
Anderson, Jon E. 571
Armenta, Tony 399
Balkman, Kathy 157
Beckham, Joseph 503
Beckmann, Johan 107
Brady, Kevin P. 101
Bratt, Carolyn S. 463
Broderick, Lauren 519
Brown, M. Christopher 139
Brown, Frank 473
Buckner, Kermit 147
Burns, B. Darren 315
Carper, Gayle Tronvig 185
Chappell, Jerry 145
Cloud, Robert C. 7
Concannon, John P. 411
Daggett, Lynn M. 255
Darden, Edwin C. 1
Dayton, John 43
de Casal, Carole V. 145
DeMitchell, Todd A. 97
DeMoss, Karen 57
Dickinson, Richard J. 411
Dieterich, Cynthia A. 315
Doty, David S. 25
Doyle, Sara L. 271
Edmonson, Stacey L. 525
Friedman, David R. 429
Gordon, Sherry G. 561
Gordon, William M. 199
Green, Charles M. 145
Green, Preston 541
Helvey, Sarah 605
Hendrickson, Robert M. 139
Hill, Flo 399
Hill, Jim 547
Hyman, Ronald T. 365
Joubert, Rika 107
Kallio, Brenda 437
Klein, Jason P. 279
Kops, Gerald 171
Lane, Jason E. 139
LaNear, John A. 415
Leas, Terrence 631
Lugg, Elizabeth T. 341
Maile, Simeon 107
Manos, Mary Ann 599
Marsh, J. Sue 145
Mattocks, T.C. 171
McCord, Robert S. 171
McKinney, Joseph R. 535
Michaelis, Karen L. 455
Mukamal, Stuart S. 429
Murray, Kenneth T. 291
Noe, Margaret A. 85
Paterson, Frances R.A. 341
Patin Jr., Charles L. 199
Pearson, Douglas 503
Rapport, Mary Jane K. 425
Redfield, Sarah E. 71
Rhoades, Merry 185
Risch, Judith 605
Rittenmeyer, Steven 185
Roberts, Nathan M. 393
Scollay, Susan J. 463
Sewall, Angela Maynard 157
Shircliffe, Barbara 223
Stader, David L. 399
Stefkovich, Jacqueline A. 301
Stellman, Leslie Robert 453
Stine, David O. 561
Stine, Deborah E. 547
Strang, Kirk D. 583
Strope, John L. 325
Tate, James O. 621
Uerling, Donald F. 325
Valadez, Liliana 437
Van Patten, James J. 223
van Vollenhoven, Willie 107
Vergon, Chuck 519
Villani, Christine J. 315
Welner, Kevin 381
Wood, R. Craig 43
Zirkel, Perry A. 245

BEST COPY AVAILABLE

Board of Directors

2001-2002

President
R. Craig Wood

President-Elect
Allan G. Osborne, Jr.

Vice President
Philip T.K. Daniel

Immediate Past President
Ralph D. Mawdsley

Directors

Lois F. Berlin
Christopher P. Borreca
John P. Concannon
David L. Dagley
Steven S. Goldberg
Fred Hartmeister
Edward J. Marko
Julie F. Mead
Carole V. de Casal

2002 Program Chair
Brad Colwell

2003 Program Chair
Mary Jane K. Rapport

ELA Staff

Executive Director
Mandy Bingaman

Bookkeeper
Judy Pleiman

Publications Manager
Megan Williams

ELA Conferences

November 13-15, 2003
Hyatt Regency
Savannah, Georgia

November 18-20, 2004
Sheraton El Conquistador
Tucson, Arizona

November 17-19, 2005
The Peabody-Memphis
Memphis, Tennessee

Education Law Association
300 College Park - 0528
Dayton, OH 45469
Phone: (937) 229-3589
Fax: (937) 229-3845
Email: ela@udayton.edu
Internet: http://www.educationlaw.org

Education
Law
Association

The premier source of information on education law . . . .

U.S. Department of Education
Office of Educational Research and Improvement (OERI)
National Library of Education (NLE)
Educational Resources Information Center (ERIC)

NOTICE

Reproduction Basis

☒ This document is covered by a signed "Reproduction Release (Blanket)" form (on file within the ERIC system), encompassing all or classes of documents from its source organization and, therefore, does not require a "Specific Document" Release form.

☐ This document is Federally-funded, or carries its own permission to reproduce, or is otherwise in the public domain and, therefore, may be reproduced by ERIC without a signed Reproduction Release form (either "Specific Document" or "Blanket").

EFF-089 (1/2003)